(5) No. 95-719

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
VOLUME I OF II
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PETITION FOR CERTIORARI FILED NOVEMBER 3, 1995
CERTIORARI GRANTED JANUARY 19, 1996

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The following opinion, orders and judgments have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for a Writ of Certiorari in No. 95-719

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

United States District Court
Southern District of New York
(93 Civ. 7204 (CLB))

United States Court of Appeals for the Second Circuit
(No. 94-7823)

Date	Documents
October 19, 1993	Complaint filed.
December 2, 1993	Amended complaint filed.
December 9, 1993	Answer to Amended Complaint filed.
February 2, 1994	Order of the district court granting defendant's motion to amend amended complaint and amending complaint filed.
June 27, 1994	Defendant's motion in limine to preclude certain evidence filed.
June 27, 1994	Order of the district court denying defendant's motion in limine to preclude certain evidence filed.
June 30, 1994	Judgment of the district court filed.
July 11, 1994	Defendant's motion for new trial pursuant to Rule 59 filed.
August 1, 1994	Order of the district couer denying defendant's Rule 59 motion filed.

Date	Documents
August 11, 1994	Defendant's notice of appeal from the judgment and the order of the district court denying defendant's Rule 59 motion filed.
September 12, 1995	Opinion of the United States Court of Appeals for the Second Circuit reversing and remanding the judgment of the district court filed.
November 3, 1995	Petition for Writ of Certiorari filed.
January 19, 1996	Order allowing Certiorari filed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM GASPERINI,

Plaintiff.

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

AMENDED COMPLAINT

Plaintiff William Gasperini, by his attorneys, Jonathan S. Abady and Kurzman Karelsen & Frank, complaining of the defendant, alleges as follows:

JURISDICTION, PARTIES AND VENUE

1. Plaintiff is a resident of the City of Moscow in The Russian Federation.

2. Upon information and belief, defendant is a New York corporation which maintains its principal place of business in Mount Kisco, New York.

3. The damages in this action, exclusive of interest, exceeds $50,000.

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332.

5. Venue is properly laid in this Court pursuant to 28 U.S.C. § 1391.

FACTS GIVING RISE TO THE ACTION

6. Plaintiff is an accomplished and experienced photographer, photojournalist, radio and print journalist and foreign correspondent. Plaintiff is presently employed by the Columbia Broadcasting System and the Christian Science Monitor. In the past, he has been employed by other news media and journalistic organizations.

7. From on or about 1980 until 1991, plaintiff lived in and traveled throughout Central America taking photographs and working as a journalist. Included were photographs depicting soldiers, guerrillas, political leaders, and indigenous peoples in Nicaragua, Honduras, Panama, Guatemala and El Salvador. Many of these photographs were obtained in active war zones, often in circumstances involving risk of serious bodily injury or death. Others were obtained in extremely remote areas. Plaintiff's photographs captured historical events, such as United States soldiers in battle in Panama, or hidden patrols of Sandinista soldiers and their adversaries, the Contra rebels.

8. In or about January 1991, defendant solicited plaintiff's most select photographs from Central America to be included in a videotape production about the history and politics of that region.

9. At defendant's specific instance and request, and pursuant to a written contract executed between the parties, plaintiff delivered to defendant three-hundred and ten (310) original and irreplaceable slide transparencies, as described above. A copy of the contract is annexed as Exhibit "A" and incorporated herein, pursuant to F.R.C.P. 10(c).

10. Defendant lost and/or destroyed plaintiff's original and irreplaceable slide transparencies.

11. Defendant has failed to compensate plaintiff for the value of the lost slide transparencies, despite due demand therefor.

AS FOR A FIRST CAUSE OF ACTION

Pursuant F.R.C.P. 10(c), paragraphs 1 through 11 are incorporated herein with the same force and effect as if pleaded separately.

12. Defendant breached its contract to plaintiff, causing him damages and consequential damages in an amount to be determined at trial, but in no event less than $1.5 million.

AS AND FOR A SECOND CAUSE OF ACTION

Pursuant F.R.C.P. 10(c), paragraphs 1 through 11 are incorporated herein with the same force and effect as if pleaded separately.

13. Defendant was a bailee and as such, is indebted to plaintiff for the value of his slide transparencies in an amount to be determined at trial, but in no event less than $1.5 million.

AS AND FOR A THIRD CAUSE OF ACTION

Pursuant F.R.C.P. 10(c), paragraphs 1 through 11 are incorporated herein with the same force and effect as if pleaded separately.

14. Defendant was negligent and grossly negligent in the loss and/or destruction of plaintiff's slide transparencies, thereby damaging his property in an amount to be determined at trial, but in no event less than $1.5 million.

AS AND FOR A FOURTH CAUSE OF ACTION

Pursuant F.R.C.P. 10(c), paragraphs 1 through 11 are incorporated herein with the same force and effect as if pleaded separately.

15. Defendant has converted plaintiff's slide transparencies, thereby damaging him in an amount to be determined at trial, but in no event less than $1.5 million.

JURY TRIAL DEMAND

A jury trial is demanded for each and every cause of action set forth herein.

WHEREFORE, plaintiff demands judgment against defendant as follows:

(i) $1.5 million on the first cause of action;

(ii) $1.5 million on the second cause of action;

(iii) $1.5 million on the third cause of action;

(iv) $1.5 million on the fourth cause of action;

(v) punitive damages of $3 million;

(vi) costs, disbursements and attorneys fees; and

(vii) for such further and different relief which the Court deems just and proper.

KURZMAN KARELSEN & FRANK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No. 93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

ANSWER TO AMENDED COMPLAINT

Defendant, The Center for Humanities, Inc., d/b/a Guidance Associates (hereinafter referred to as "Guidance Associates") by its attorneys BIGHAM ENGLAR JONES & HOUSTON, as and for its answer to plaintiff's amended complaint herein states as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in those paragraphs of the amended complaint designated "1", "4", "6" and "7".

SECOND: Denies each and every allegation contained in that paragraph of the amended complaint designated "2" except that this defendant admits that it is a Delaware corporation which maintains its principal place of business in Mount Kisco, New York.

THIRD: Denies each and every allegation contained in those paragraphs of the amended complaint designated "3", "8" and "11".

FOURTH: Denies each and every allegation contained in that paragraph of the amended complaint designated "9" except that this defendant admits that a written agreement was entered into between plaintiff and this defendant which agreement was annexed as Exhibit "A" to plaintiff's complaint and begs leave to refer to same at the time of trial and demands that plaintiff produce same at the trial of this action.

FIFTH: Denies each and every allegation contained in that paragraph of the amended complaint designated "10" except that this defendant admits that it was unable to return any slides that may have been delivered to it by plaintiff.

AS TO THE FIRST CAUSE OF ACTION

SIXTH: Repeats, reiterates and realleges each and every allegation and denial contained in those paragraphs of this answer to the amended complaint designated "FIRST" through "FIFTH" with the same force and effect as if set forth herein at length.

SEVENTH: Denies each and every allegation contained in those paragraphs of the amended complaint designated "12".

AS TO THE SECOND CAUSE OF ACTION

EIGHTH: Repeats, reiterates and realleges each and every allegation and denial contained in those paragraphs of this answer to the amended complaint designated "FIRST" through "SEVENTH" with the same force and effect as if set forth herein at length.

NINTH: Denies each and every allegation contained in those paragraphs of the amended complaint designated "13".

AS TO THE THIRD CAUSE OF ACTION

TENTH: Repeats, reiterates and realleges each and every allegation and denial contained in those paragraphs of this answer to the amended complaint designated "FIRST" through "NINTH" with the same force and effect as if set forth herein at length.

ELEVENTH: Denies each and every allegation contained in those paragraphs of the amended complaint designated "14".

AS TO THE FOURTH CAUSE OF ACTION

TWELFTH: Repeats, reiterates and realleges each and every allegation and denial contained in those paragraphs of this answer to the amended complaint designated "FIRST" through "ELEVENTH" with the same force and effect as if set forth herein at length.

THIRTEENTH: Denies each and every allegation contained in those paragraphs of the amended complaint designated "15".

AS FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE

FOURTEENTH: Any damages allegedy suffered by the plaintiff herein resulted from the acts and/or omissions of certain third parties for whose conduct this defendant is not responsible.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE

FIFTEENTH: The complaint herein does not state a claim against this defendant upon which relief can be granted.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE

SIXTEENTH: Upon information and belief, this Court does not have subject matter jurisdiction over the within action.

AS AND FOR A FOURTH COMPLETE AFFIRMATIVE DEFENSE

SEVENTEENTH: Upon information and belief, the causes of action against this defendant are barred by the applicable statute of limitations.

AS AND FOR A FIFTH COMPLETE AFFIRMATIVE DEFENSE

EIGHTEENTH: Upon information and belief, plaintiff herein has failed to mitigate his damages and, as such is barred from any recovery against this defendant.

WHEREFORE, defendant, The Center for Humanities, Inc., d/b/a Guidance Associates demands judgment against the plaintiff dismissing this action, together with costs and disbursements.

Dated: New York, New York
December 9, 1993.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
The Center for Humanities
d/b/a Guidance Associates

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New York, New York 10028

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

MEMORANDUM & ORDER

BRIEANT, J.

The prior direction of this Court that a trial jury be selected on February 28, 1994, is hereby withdrawn pending decision on defendant's motion to dismiss for want of subject matter jurisdiction, which will be heard on February 24, 1994 at 9:00 a.m.

By motion docketed February 14, 1994, plaintiff seeks leave to amend his amended complaint further in order to allege that he is and was at the commencement of this action a citizen of California. The amended complaint in the action alleged that plaintiff is, "a resident of the City of Moscow in the Russian Federation", as did the initial complaint. Leave to amend is freely granted. Accordingly, plaintiff's motion to amend is granted at this time so as not to delay resolution of this matter. Defendant is deemed to have denied the juris-

dictional allegations as amended, and defendant's motion to dismiss will be deemed directed to the amended complaint.

On the return date of that motion, plaintiff shall be prepared to present such documentary evidence, if any, which will establish to the satisfaction of this Court that he is in fact a citizen of the State of California.

SO ORDERED.

Dated: White Plains, N.Y.
June 30, 1994

/s/ CHARLES BRIEANT
Charles L. Brieant
U.S.D.J.

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that the undersigned will bring on the annexed notice of motion to dismiss plaintiff's complaint for lack of this Courts' subject matter jurisdiction pursuant to FRCP Rule 12 B for hearing before this Court, at Room 31, United States District Court, Southern District of New York, U.S. Courthouse, 101 East Post Road, White Plains, New York 10601-5086, on the 25th day of February, 1994, at 9:00 a.m. in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: New York, New York
February 11, 1994

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
The Center for Humanities
d/b/a Guidance Associates

By /s/ KARIN A. SCHLOSSER
Karin A. Schlosser (KS 4055)

Office and P.O. Address
14 Wall Street
New York, New York 10005
(212) 732-4646

Motion Denied. See transcript for oral decision.

SO ORDERED.

February 24, 1994 /s/ Charles Brieant
U.S.D.J.

FILED
U.S. DISTRICT COURT
FEB 24 1994
S.D. OF N.Y.

MICROFILM
FEB 24 1994-10:00 AM
U.S.D.C. SCNY WP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

MOTION IN LIMINE

Defendant, The Center for Humanities, Inc., d/b/a Guidance Associates, by its attorneys, BIGHAM ENGLAR JONES & HOUSTON, hereby moves this court, at the Courthouse, White Plains, New York on June 27, 1994 *in limine*, for an Order precluding the plaintiff in the within action, William Gasperini, from presenting any evidence during the trial of this action with regard to the existence and/or applicability of a claimed "industry standard" pursuant to which a uniform predetermined minimum amount of compensation is assigned to each and every slide transparency which may have been lost or damaged. This Order is requested in light of the pre-

vailing decisional law establishing that no such "industry standard"

Motion Denied. See transcript of trial for oral decision.

SO ORDERED.

June 27, 1994

/s/ CHARLES L. BRIEANT
USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,

Defendant.

U.S. Courthouse White Plains, N.Y.
June 27, 1994 9:45 a.m.

JURY TRIAL BEFORE:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES

SAMUEL A. ABADY, ESQ.
JONATHAN S. ABADY, ESQ.
Attorneys for Plaintiff

FRANCIS A. MONTBACH, ESQ.
KEVIN H. YOUNG, ESQ.
Attorneys for Defendant

Sue Ghorayeb, R.P.R., C.S.R.
Court Reporter

[2] THE CLERK: William Gasperini against the Center For Humanities, Inc.

THE COURT: As I understand it, we have some kind of in limine motion which seeks to prevent the introduction of testimony or evidence.

MR. MONTBACH: Yes, your Honor.

THE COURT: Ordinarily, those motions have an uphill struggle because the test for the validity of facts is sworn testimony and cross-examination.

MR. MONTBACH: Your Honor, as presented in that motion, that motion impacts on a lot of the testimony which I think is—the subpoenas and supposed expert witnesses—new expert witness that was served on us on Friday, which we objected to all throughout this litigation.

THE COURT: Kindly use the lectern.

MR. MONTBACH: Throughout this litigation, your Honor, we have heard talk of an industry standard of a minimum of $1,500.

THE COURT: I understand that you claim no such standard exists.

MR. MONTBACH: No such standard exists, your Honor.

THE COURT: Why isn't that a jury question?

MR. MONTBACH: Because it's a legal question, [3] your Honor. The case law in New York clearly shows there is—no such standard exists. There is a measure, uniqueness of the slides, the earning history of the photographer, but not a knee-jerk each slide is $1,500 a slide. I think that's extremely prejudicial in front of the jury.

THE COURT: It's so absurd that subject to cross-examination will make the claim look outrages.

MR. MONTBACH: Your Honor, I understand. It is going to look absurd.

THE COURT: The Court will instruct the jury the market value of an item is what a reasonable buyer, reasonably well-informed, would pay from a similarly situated seller, and that's what they are to go by. And the fact that some society may have a minimum value doesn't mean everything sells for that price. The existence of the standard may be some evidence as to what people get.

MR. MONTBACH: Your Honor, we have here a photographer who is not a member of that society, is not a member of the industry.

THE COURT: That goes to the weight, doesn't it?

MR. MONTBACH: I understand, your Honor, but I don't want this—

THE COURT: Motion denied.

[4] MR. MONTBACH: Your Honor, may I make my statement for the record then?

THE COURT: Indeed. Isn't it adequately covered in your brief?

MR. MONTBACH: It is somewhat, your Honor. But getting in front of the jury—they have subpoenaed records on supposed payments we have made on receipts that we supposedly did with another business, with other people, that has this $1,500 number in it. We have now two experts supposedly, one named Friday afternoon, who we are going to object to.

THE COURT: Well, maybe I ought to let you finish this because I have already ruled on it. You are just talking to hear yourself.

MR. MONTBACH: No, your Honor. I am trying to explain myself.

THE COURT: Five minutes to talk to hear yourself.

MR. MONTBACH: We have a subpoena served asking for records of contracts with other organizations or slides, that

has nothing to do with this case, from 1960 to date. I am going to move to strike that part of the subpoena.

THE COURT: That will be denied also.

MR. MONTBACH: Your Honor, we have a subpoena [5] served for financial records of the corporation. That has nothing to do with this case.

THE COURT: What's the purpose of that?

MR. S. ABADY: I am sorry, Judge.

THE COURT: Subpoena for financial records of the defendant.

MR. S. ABADY: Yes, your Honor. It came out in deposition that the defendant's appreciation of its exposure and the value of the loss may well be reflected in financial records of the corporation particularly.

THE COURT: So what?
What is the probative value of that?
Someone keeps prudent accounting records and takes a reserve against potential liability. Is that what they did?

MR. S. ABADY: We don't know, your Honor, until we see the records.

THE COURT: If you don't know, don't worry about it. I will vacate that part of the subpoena.

MR. S. ABADY: Judge, may I clarify the record then. As your Honor knows from your experience and practice that accountants, for example, seek statements from attorneys—

THE COURT: I have made a ruling. I made a ruling. The ruling happened to be a correct one. You can [6] have an exception but don't waste my time.

MR. S. ABADY: I will sit down, your Honor.

MR. MONTBACH: You haven't ruled on what I called delivery memos, delivery invoices from other organizations for The Center For Humanities, when there is no delivery memo involved in this lawsuit.

THE COURT: I don't know how they are relevant. Maybe they are. There is a difficulty with in limine rulings because it's a temptation to rule without a full understanding of why something is being offered.

MR. MONTBACH: I understand, your Honor.

THE COURT: I don't see that they are relevant.

MR. MONTBACH: They have asked for the records from 1960 to date. Half the records are up in a mountain.

THE COURT: If they are up in the mountain, you can't bring them down.

MR. MONTBACH: We have brought in what we have, if any such exist.

THE COURT: Produce all you have. All of that should have been done in pretrial discovery.

Mr. MONTBACH: Thank you, your Honor.

THE COURT: Anything else?

MR. MONTBACH: No.

MR. S. ABADY: Judge, as to your comment about—as to your comment about value, I would just ask the Court [7] to—when you have an opportunity—to look at pages 15 to 25 of the pretrial brief because it discusses the fact that New York courts have repeatedly recognized the $1,500 minimum value.

THE COURT: It's only some evidence.

MR. S. ABADY: I understand, your Honor.

THE COURT: It's not binding. It's not controlling. It's some evidence. No witness is going to testify that every transparency that's sold gets that price. Some obviously get more, some get less. So, it's some admissible evidence but it's certainly not binding. If you put too much emphasis on it, your case will lose credibility.

MR. S. ABADY: Also, your Honor, it is not market value but actual value which is discussed in the brief.

THE COURT: Market value is actual value. This is an article of trade.

MR. S. ABADY: Those are two distinct concepts. I don't want to recapitulate—to repeat.

THE COURT: It has no actual value beyond what a person will pay. Nothing does. This is his stock in trade. This is merchandise. This is a deal between merchants.

MR. S. ABADY: Judge, let me just leave the issue now. I know when you have the opportunity you'll review [8] the memorandum for the value you find that it has.

THE COURT: What do you say actual value is?

MR. S. ABADY: Actual or intrinsic value is a concept apart from market value. It's laid out in point B on pages 16, 17, 18 to the top of 19.

THE COURT: Well, I really don't think so.

MR. S. ABADY: You will have an opportunity to read it and see the discussion.

THE COURT: I really don't think so. I am reasonably well persuaded we are talking about market value. Some of the things they are talking about in there are things which have no value. This was material offered for sale, was it not?

MR. S. ABADY: Not for sale, your Honor, but for reproduction rights.

THE COURT: Sale of part of the totality of ownership.

MR. S. ABADY: The cases discussed, beginning at page 16, have to do with the loss of photographs and other valuable papers—

THE COURT: Court has to take a recess.

MR. S. ABADY: —which may have no market value.

THE COURT: Well, I think this stuff had a market value or they wouldn't have wanted to have it. I am reasonably well set but I will study your submission here.

[9] MR. S. ABADY: That's all I ask.

THE COURT: I am reasonably convinced market value loss is the measure of damages here. Maybe because you don't agree on such a basic, simple thing as that which prevents you from settling this case.

MR. S. ABADY: The insurance coverage is the only thing that prevents settlement, your Honor.

THE COURT: Court will be in recess for the moment.

(Recess)

THE COURT: The record should show that juror Paneissa called and said his uncle died. The mother of juror Hoffinbacher called the Clerk Office and said he was ill over the weekend and he was going to the doctor this morning. So, as a result, we are down to six jurors.

How long for your opening?

MR. MONTBACH: Your Honor, I have one more question to bring—I am sorry to burden the Court with this.

THE COURT: I don't mind being burdened but I dislike delay. What's the question?

Mr. MONTBACH: The issue—they have named on Friday afternoon an additional expert witness who was previously called as a fact witness.

THE COURT: So, it's no surprise to you. I have [10] to try the case.

Mr. MONTBACH: It is, your Honor.

THE COURT: How can it be a surprise if he is a fact witness?

MR. MONTBACH: He is listed as a fact witness. Now they are trying to make him an expert witness.

THE COURT: What's your application?

MR. MONTBACH: That he not be permitted to testify as an expert witness.

THE COURT: Motion denied.
How long for the opening statement?

MR. S. ABADY: 20 to 30 minutes, Judge.

THE COURT: No more than that.
How long for you?

MR. MONTBACH: Five to ten minutes.

THE COURT: Fine. Bring in the jury.

MR. S. ABADY: One other housekeeping matter. Forgive me. I don't mean to frustrate, your Honor, but I figure you want this out of the way in the beginning.

Two things. One, we've subpoenaed as Mr. Montbach indicated, certain documents from the defendants, and I have not been given that document production. Now I wonder whether I would have a chance to examine them after openings.

THE COURT: Not before openings because you won't [11] have more than half a minute before opening.

MR. S. ABADY: I requested it earlier.

Second thing, your Honor, I have subpoenaed—in light of your admonition to me not to run out of witnesses, I have subpoenaed four witnesses from the defendants.

THE COURT: Why don't you put them on this morning out of order?

MR. S. ABADY: I understand some of them may not be coming. Now, it may not matter in terms of the number of people we have.

THE COURT: You know, you are just anticipating trouble. If you get a situation where they are not coming, then I would find out about it and I will make him wish they have.

MR. MONTBACH: They are on telephone notice. They are coming.

THE COURT: I can only run for about two hours. Don't waste my time.

MR. S. ABADY: Would your Honor inquire of the jury if they ever heard of Robert Zentmaier?

THE COURT: No. That should have been done on jury selection.

MR. MONTBACH: This is a new witness that hasn't been named. I don't know who this person is.

[12] MR. S. ABADY: Because we have just discovered him, your Honor, just the last few days.

THE COURT: You better give me an offer of proof before you call him. We have to come to an end some time.

MR. MONTBACH: Your Honor, may I hand up the exhibit list and jury instruction requests?

THE COURT: Yes.

(Jury present in the courtroom)

THE COURT: Will you all kindly take your oaths as trial jurors.

(Jurors sworn in to try the case)

THE COURT: Thank you. Please be seated.

The order in which the trial will proceed is as soon as I finish speaking, the attorney for the plaintiff will make a brief opening statement to you. That statement is not evidence. Nothing a lawyer says is evidence unless they have stipulated to a fact, and questions aren't evidence, only answers.

As soon as he is finished, the attorney for the defendant may, if he chooses, make an opening statement although he is not required to since the plaintiff has the burden of proof in the case.

After the opening statements we will begin to hear witnesses. First, the plaintiff's side of the case, then the defendant may call witnesses. If it does, [13] plaintiff may call rebuttal witnesses.

After all the witnesses have testified, the attorneys will make closing arguments to you in which they will attempt to summarize the evidence for you and argue to you what conclusions or inferences they think that you should draw from the evidence. After that's been finished, the Court will instruct you as to the applicable law which concerns the case.

Now, until you have heard all of that, including the Court's instructions as to the law, it's important that you keep an open mind. Don't discuss the case with each other or anybody. Don't reach any conclusions until you have heard everything. And then, after you've heard it all, you will deliberate with each other and reach a fair and impartial verdict.

If you happen to be in the elevator and someone starts to talk about the case, you just tell him, "Stop. I am a juror," because you are obligated to keep yourself free from anything that might taint your verdict.

The scheduling here is we will run until about noontime today, then we will break for today. There will be no court on this case tomorrow and we are resuming on Wednesday, at 9:45 on Wednesday morning.

All right. At this point, Mr. Abady, you may make an opening statement on behalf of the plaintiff.

[14] MR. J. ABADY: Thank you, Judge.

May I use the lectern, Judge?

THE COURT: Yes. Everyone has to use it.

MR. J. ABADY: May I proceed, Judge?

Good morning. A picture is worth a thousand words. It's a phrase we have heard so often, it's become a cliche. It's a cliche.

THE COURT: No more cliches. Just tell them what you expect to prove, not to argue, not to talk about the law. Just say, "we will prove the following facts in this trial."

MR. J. ABADY: Yes, Judge.

This is a case about photographic images. It is about 310 unique, irreplaceable, original slide transparencies. It is about the value of those slide transparencies.

My name is Jonathan Abady. I represent the plaintiff, William Gasperini, who is seated here at plaintiff's table. I am representing Mr. Gasperini with Samuel Abady, who is my co-counsel.

The defendant in this action is also represented by his attorneys—the defendant is actually a corporation—Francis Montbach and Kevin Young, who will be representing the defendant.

As Judge Brieant told you when you were selected [15] as jurors several weeks ago, this is a case about a photojournalist, our client, Mr. Gasperini, who over the course of seven years took a series of photographs in Central America.

Mr. Gasperini is a professional photojournalist. You will learn he then gave those photographs approximately four years ago, in 1990, to the defendant corporation. The defendant corporation you will learn is Guidance Associates, also known as The Center For Humanities. The defendant corporation you will learn has a long history in dealing with photographic images, still photography, video and film.

You will hear from the president of the defendant corporation that they solicited Mr. Gasperini's slides because they discovered that he had amassed a large body of work about the history of the wars and political activities in Central America; and they specifically solicited Mr. Gasperini's slides because at that time he was the only person that they knew of who had that kind of body of work.

There are only two issues in this case, how many slides were lost and what their value is.

This part of the trial is the opening statement. As the Judge told you, it's kind of like a road map. It's a preview of the evidence. There will be two kinds of [16] evidence in this case. There will be documentary evidence in the form of letters, contracts, forms and memos, and there will also be live testimony, witnesses, ordinary witnesses and expert witnesses.

After you have heard all of the testimony in this case, after this case has been fully presented, we will prove to you that the value of each of the 310 slide transparencies that the defendant lost was the industry standard of $1,500 per transparency at a minimum, at a minimum. That because of the unique subject matter of these particular slides and the conditions under which they were taken, the proper value is actually more than the standard of $1,500.

Let me tell you a little bit about the specific evidence that you are going to hear. One of the people that you will meet during the case of this trial is William Gasperini, and you will learn that Mr. Gasperini is a unique and extraordinary individual with a distinguished career in journalism.

You will see that with the exception of Australia and Antarctica, Mr. Gasperini has traveled the entire globe. He has worked in some of the most conflictive, dangerous regions of the world, and he has reported on the major events of our day there.

He worked in the Gulf War in the Middle East, in [17] the U.S. invasion of Panama. He covered the collapse of communism in the Soviet Union and the massive humanitarian efforts recently of the United States to help thousands of starving children in Somalia.

You will learn that Mr. Gasperini is a particular type of photographer. He is not an ordinary photographer. He is what's known in the industry as a photojournalist.

You will understand—you will hear that a photojournalist typically, who works abroad, frequently lives abroad. And you will see that Mr. Gasperini speaks a number of different languages, that he has become an expert on culture, history, politics and the life of these regions. And that is why his photographs have a particular and unique value, because he has detail appreciation of the culture, politics and the life of these regions.

So, it's very different for someone who is an expert on a particular region to take photographs seeking to document historical events. It is different for that person to be sent out to take photographs than for someone who has never been in the region, who doesn't know what the indigenous communities are like, who doesn't know what the political issues are. That is a unique type of photography. It will be critical for

you to appreciate that difference between ordinary photography and [18] photojournalism.

You will see that Mr. Gasperini is most familiar and spent most of his professional career in Central America. Between 1983 and 1990, Mr. Gasperini spent almost seven years in Central America, at a period when that region of the world was at the center of world attention.

You will see that he covered all of the major issues in that region: The conflict in El Salvador where tens of thousands of people were killed. The conflict in Nicaragua where many thousands of people were killed. The U.S. invasion of Panama and the falling of General Manuel Antonio Noriega. He covered the war—guerrilla fighting in Guatemala, many times at substantial personal risk.

You will see and you may hear evidence from the defendant that Mr. Gasperini—you may hear a suggestion that he is not a professional photojournalist. Mr. Gasperini is a professional photojournalist. We will prove that to you. You will see he has taken over 10,000 slides in his career. He took 5,000 slides over the approximately seven-year period in Central America.

What's critical to understand is only a small percentage of a large shoot, of a large body of work like that has a permanent lasting market value. Typically, photojournalists take shots. They may take two or three [19] rolls, and only one or two pictures has the correct depth of field or right lighting conditions, right exposure taken at the right angle and right subject matter to actually capture the image and you have the permanent lasting market value.

The way that a body of work of several thousand slides is distilled down to those select images is the editing process. You will see that after the defendant corporation contacted Mr. Gasperini, he engaged in an extensive, careful editing process of all the slides of Central America that he had taken. That editing process took him a year. He distilled the photographs down to the finest 300 images. There was 300 images after that editing process that had permanent market value. Those were his select images.

You will see that Mr. Gasperini never intended to leave those slides with the defendant corporation. The original plan, you will see, was that Mr. Gasperini would work with the defendant corporation to help produce a video, to help write the script and to select the slides. But you will see that after turning over the slides to Guidance Associates, the project lagged, there was a delay, and it was in February of 1991 and war broke out in the Middle East.

Mr. Gasperini was sent by CBS News to cover the [20] war in the Middle East. The defendant corporation persuaded him to allow them to keep the images, to allow them to work on the project. It turned out to be a tragic event, as you will see, because that was the last time that Mr. Gasperini ever saw those 300 select images. He left the 300 images with the defendant. He never saw them again. They are gone.

The loss you will see is particularly tragic because Mr. Gasperini never had an opportunity to fully market those slides. Mr. Gasperini worked in Central America for seven years. He did sell a number of photographs to newspapers that he wrote stories for but that he was not making an intensive effort at that time to market those photographs. He was not concentrating on marketing the photographs.

As radio and print photojournalist, his immediate news gathering was in radio and print. Photography, unlike those mediums, has a lasting permanent value and cannot be realized on the market until an edit such as I have described has occurred. Ironically, Mr. Gasperini had not done the edit on his work until the defendant approached him.

You will see that Mr. Gasperini does not intend to spend his entire life abroad, that he plans to return to the United States and live in the United States. It [21] was that body of work that he was amassing from Central America that is no longer available.

You will hear testimony—in addition to testimony from Mr. Gasperini, you will hear testimony from his mother, Charlotte Gasperini, and Miss Gasperini will tell you that she was contacted also by the defendant corporation in early 1990 and spoke with the president of the company, and the president of

the company solicited additional slides from her for use in a promotional catalogue. And Charlotte Gasperini, who lived close to the corporate headquarters of the defendant, delivered an additional ten slides to the corporate headquarters and those slides were also lost. So, you will see that the total amount of slides lost by the defendant is 310 slides.

You will see and we will prove to you that these slides were extraordinary photographs, that they were beautiful professional images. In many cases, they were spectacular and stunning. They were not slides taken by a hobbyist or amateur. They were taken by a professional photojournalist.

The slides were taken by Mr. Gasperini at tremendous risk to his life and limb. There are slides that were lost by the defendant that Mr. Gasperini took while he was being fired upon by helicopter gun ships in [22] El Salvador. There were slides that were taken while a colleague of Mr. Gasperini was shot only a few feet from him.

There are images that the defendant lost where Mr. Gasperini was captured by Nicaraguan soldiers in the jungles of Nicaragua. Those slides are lost. There are shots also of historical figures, from peasants to presidents.

All of Central America's presidents were photographed by Mr. Gasperini: Oscar Arias, former president of Costa Rica and a Nobel prize winner. The former president of El Salvador who is now dead. Daniel Ortega, former president of Nicaragua, and Violeta Chimorzo, the current president of Nicaragua.

All those photographs taken at critical moments in history. You will hear about moments of history like the historic peace conference in Guatemala. All of those shots were lost. There were shots of peasants and villagers taken many times in remote areas only reached by horseback or tremendous amount of travel.

There are shots that covered the culture and history by someone who has a trained eye and who had spent their life studying those regions. Those are the types of exceptional photographs that were lost.

You will hear from the current president of the [23] defendant corporation, Guidance Associates, William Goodman. You will see that William Goodman is a sophisticated businessman. He graduated from Princeton and Columbia universities, and he will explain to you that the defendant corporation had an extensive history in dealing with photographic imagery. They had an extensive history of dealing with stock photography.

They employed people with expertise and training in knowing how to deal with stock photography. They have more than 10,000 images in a warehouse in Lyon* Mountain. They have thousands of slide transparencies on their premises at 90 South Bedford Road. The company has made millions of dollars over the years off of these slide transparencies.

They are a company that is fully familiar with the industry standards. And you will get an indication from the testimony of the president of the corporation of what the value of these slides was because you will see that when he discovered—when they discovered that the slides were missing, they conducted an exhaustive, panicked search. They looked for these slides for over a year before they acknowledged that they were lost. And the reason that they looked so furiously, you will see the reason they looked so long before acknowledging the loss is because they knew the value of the slides.

[24] You will see there is a written confirmation, written proof that 300 slides were delivered by Mr. Gasperini. There will be no genuine issue about the number of slides because of that written proof signed by the president of the corporation and indicating that the 300 slides were lost.

But you may hear from the president of the defendant corporation, you may hear him say to you that he is not aware of the industry standard, that he doesn't know it exists. And you may hear testimony from the defendant corporation that no such industry standard of $1,500 for the damage or loss of a slide transparency exists.

You will learn a significant amount about photography by sitting through this trial. One thing we will prove to you dur-

ing this trial is that there is an industry standard, that the defendant knew about it and that it is $1,500 per transparency.

We will show you that through documentation, through memos, and we will show you that in part by documents and memos that were coming in and out of the defendant corporation for almost twenty years. And so, the claim that the industry standard does not exist and that the defendant did not know about it is a claim we expect to disprove in a resounding way.

[25] In addition to the documentary evidence, you will also hear witnesses testify about the existence of the industry standard. You will hear from Robert Zentmaier. You may hear from Robert Zentmaier, who is the president of one of the larger stock companies in the United States called Photo Researchers. Mr. Zentmaier will tell you and testify to the existence of the industry standard.

He will tell you that it is known by everyone in the industry and he will tell you that his stock agency has had a particular course of dealings with the defendant corporation that went back to 1977 and goes throughout the 1980s and into the 1990s. And during the course of that interaction with the defendant corporation, memos were sent, memos were received, memos were signed by the defendant corporation with the terms and conditions of the industry standard written all over them.

You will see that in 1977 this corporation lost slide transparencies and paid a fee pursuant to the industry standard. You will see that this company has continuously been in receipt of slide transparencies and knows the value of them. And so, while you may hear from the president of the corporation that no such industry standard exists, you will hear some very contradictory evidence from Mr. Zentmaier.

You will also hear from the Chief Executive **[26]** Officer for The Center For Humanities, Jack Goodman, he is a man who's been in the business—it's a family business—for several years. He knows about the industry standard. He knows it's $1,500.

You will hear from the financial officer of this corporation and she will testify that after the loss occurred, she had meetings with the Chief Executive Officer of the defendant corporation and she had meetings with the president, and they discussed value, and of course, they discussed the industry standard. They specifically discussed the industry standard of $1,500. You will hear that from the chief financial officer.

And then, finally, you will hear from some very special witnesses. You will hear from a man named William Kuebler. Mr. Kuebler is an accomplished photographer in his own right. He was chief photographer of one of the local suburban newspapers here. His work was published in U.S.A. Today, the National Inquirer, Next Magazine.

He is one of the chief photo editors of the Gannett newspapers service. As you know, Gannett is one of the largest newspaper media organizations in the world. They own 83 newspapers. They have a staff of thousands of photographers. Mr. Ruebler's editorial decisions involved the supervision of 16 award winning professional photographers.

[27] You will see that Mr. Kuebler is intimately familiar with Mr. Gasperini's work, that he has viewed thousands of his slides. And you will see that—Mr. Kuebler will tell you that Mr. Gasperini is not only clearly a professional photojournalist but he is an excellent photojournalist, that Mr. Gasperini's work is on a par with the award winning photographers that Mr. Kuebler supervises on a daily basis.

Then you will also hear that opinion of the quality of Mr. Gasperini's work supported by an employee of the defendant corporation. You will hear testimony from a woman named Susan Green. Susan Green is the woman who was employed by The Center For Humanities, who handled the 300 images that Mr. Gasperini turned over to the defendant corporation. And Susan Green will describe Mr. Gasperini's work as first rate.

Finally, you will hear from a woman named Jane Kinne. Miss Kinne is perhaps the nations leading expert in the evaluation of photographic images. She worked in the field for many decades. She testified in hundreds of cases.

You will learn from her about the industry standard. You will learn there is nothing new about the industry standard. It has existed for more than 25 years. You will learn that it is published and printed in every **[28]** major guide to industry practice that is available to photographers and publishers.

You will see that the industry standard of $1,500 is printed all over the delivery memos of all of the stock agencies, that it is in the handbook by the American Association of Picture Professionals.

You will hear from Miss Kinne the industry standard of $1,500 is not an arbitrary standard. It is not a standard that was developed by photographers for photographers. It was the result of a national commission on valuation being set up, which was composed of every possible component and player in the photographic industry; not only photographers but agents, advertising agencies, major publishers, major news organizations; all played a role in establishing an industry standard.

And Miss Kinne will explain to you why prior sales history is not the critical element in evaluating the value of a slide transparency. It is not.

She will describe for you how photographs are placed in stock agencies and how they have repeat value. How particularly photographs with historic and cultural content have cyclical and recurrent value, that they can sit in stock agency draws for ten, 15, twenty years, and when they become relevant again, they are used.

An example you will hear is the D-Day invasion. **[29]** There are photographs that sat in stock agencies—you will hear testimony they sat in the stock agency for 50 years, then during the D-Day celebration sold for thousands and thousands of dollars.

You will hear from the defendant corporation that for the one time use of a photograph they pay up to $700. So that if Mr. Gasperini's images sold three times, they would already have earned $2,100. Well in excess of the minimum standard.

So, you will hear Miss Kinne describe to you how the industry standard of $1,500 is actually considered a conservative estimate for photographs that have permanent lasting market value and that had been properly edited.

At the close of this case you will see that Mr. Gasperini is a person who has made a tremendous amount of sacrifice in his life. He has worked and lived abroad. He has made a salary that is less than he could have made had he worked in the United States as a journalist. He made the sacrifice for long-term gain.

He was young. He was in a position to take risk. He was hungry for knowledge. He went out and traveled around the world. He traveled extensively in Central America working for the major news organizations in this country. He selected images. He built a body of work.

It was his intention to take that body of work **[30]** and to realize the market value when he came back to the United States, to edit those photographs, to write a book, a retrospective book like many of his colleagues have written on all of his travels and experiences in Central America, to sell that book.

It was his intention to exploit the exploding market of computer technology, to market his slides for sales in that industry, to place them with stock agencies, to use them for the life of the copyright plus 50 years, which is where the value comes from and you will hear about that. He has not the ability now to do that. Those images are gone. Those original transparencies are lost that he spent seven years of his life collecting.

At the end of this case, it will be clear to you that an industry standard exists, that the defendant corporation knew about the industry standard, and that at the very minimum Mr. Gasperini is entitled to the industry standard for the 310 photographs that he worked so hard to get. Thank you.

THE COURT: All right. Thank you, sir.

Mr. Montbach, you may make an opening statement on behalf of the defendant, if you wish to do so.

MR. MONTBACH: I do, your Honor. I will make it very brief. Thank you.

MR. S. ABADY: Judge, your Honor, before we [31] proceed with the defense opening—

THE COURT: No. Just sit down. Let him speak, will you?

MR. S. ABADY: I wanted to ask that his witnesses be sequestered.

THE COURT: That's your right under the rules. If there is any witnesses that were not a principal, they have to sit outside.

MR. S. ABADY: Thank you, Judge.

MR. MONTBACH: Good morning, ladies and gentlemen. I am happy to see you again after that long delay before the trial started.

THE COURT: Don't worry about the delay. The delay from hence forward is what I am concerned about. Just stick with the facts you intend to prove.

MR. MONTBACH: Yes, your Honor.

THE COURT: The delay was not the fault of this Court.

MR. MONTBACH: I didn't ascribe any fault, your Honor.

THE COURT: Get away from it.

MR. MONTBACH: What we are going to show you here is that this was not strictly a commercial transaction. The testimony that we will be offering will show that through mutual friends Guidance Associates came into [32] contact with Mr. Gasperini and an attempt was made to make a little money for both parties. This attempt was to create a video to be used in high schools concerning the events in Central America.

You will hear testimony to the effect that, unfortunately, at the time this video was being made, the market for such videos had virtually ended. It was a market that had been in existence for many years, but now, because of events beyond the control of high schools and Guidance Associates, that market did not flourish anymore.

The testimony will show that Guidance Associates really didn't seek out Mr. Gasperini. When he came in with his slides after mutual agreement, they were put into a video, and Miss Green, who is going to testify for the plaintiff, Miss Green is a former employee of Guidance Associates, created a video; not using just Mr. Gasperini's slides but using actual video and also archival material. And you will see there is—a three volume video was made. Unfortunately, that video did not sell.

Now, the agreement between—you will see from the testimony the agreement between Guidance Associates and Mr. Gasperini was for royalties. There was no agreement—there was no delivery memo. You heard talk of delivery memos. Here there was no delivery memo [33] ascribing value to the slides. There was no consideration for these slides or anything. There was a royalty agreement.

Pursuant to that royalty agreement Guidance Associates paid a certain amount of money based on the gross revenues of this video and sales, and has paid those monies to Mr. Gasperini. They continue to pay those monies.

You will also find that when it became apparent the video was not selling very well, Mr. Gasperini approached Guidance Associates about his compensation. This approach was made when it was known that, unfortunately, the slides were missing.

You heard the speech about how we would not acknowledge the slides were lost for a year. It was known the slides were missing and they kept on looking for them. Unfortunately, they had to give up at a certain time. In fact, they are still looking now.

During that time period, Mr. Gasperini approached Guidance Associates and said he hadn't been compensated enough because the video wasn't selling. Guidance Associates outside of what was called for in the contract made payment to him, a voluntary payment of $3,500, which Mr. Gasperini took.

We do not deny that the slides have unfortunately [34] been misplaced and cannot be located at this time. Correctly, we searched for them. Every—almost every employee of the

organization searched for them. A search was made in storage where they shouldn't have been and they weren't there.

It will be nice to be able to come into court today and say, "Here they are. We found them," but we unfortunately can't. Unfortunately also, Mr. Gasperini did not make any copies of his slides before he gave them to us. He intended to. And the testimony that he gave during the pretrial deposition does not agree with what counsel has said he is going to testify to. He gave us those slides and meant to make copies but he said he had to go off to the Gulf War. It's not at least what Mr. Gasperini said.

We had them for a while. He worked with our people. Then he had to go off to the Gulf War. He had ample time to make copies but he didn't do that.

Guidance Associates, we will establish, has lived up to its contract. As I said, it has paid him more than they were supposed to. We understand that he's had a loss. We are not saying he should not be compensated for that loss but what we are saying, one is, there is no industry standard. We will have expert testimony that there is no industry standard.

[35] And two, we are saying these slides, as interesting as they are, one, are not unique, and two, Mr. Gasperini does not have a history of earning any money from these slides or any of the slides which he took while he was in Central America.

In fact, we would not call him a photojournalist. We would call him a journalist who happened to take photos while he was down doing his job as a radio journalist or print journalist in Central America. We are not saying he doesn't take good pictures. We will not deny these pictures were good enough quality to be used in the video we put together.

It's sort of like the old philosophical argument question, if a tree falls in the forest and no one is there to hear it, it doesn't make a noise.

Mr. Gasperini kept all his pictures at his mother's home in shoe boxes in a room. Actual slides or pictures that have been taken by someone who is not a photojournalist, sitting in somebody's house, his mother's house, have a value when he doesn't market them.

The testimony of Mr. Gasperini himself will establish that over the seven years between 1984, when he started taking these pictures, and 1990, when pictures were given to us, he earned $7,000 total from the sale of his pictures. These include $2,000 that he earned from **[36]** pictures he took when he took a sabbatical while he was in South America. I think it was 1988, '89. The testimony will establish that then he went to Asia.

So, he earned $5,000 roughly over a seven-year period from the sale of these slides, yet he wants $5,000 for each. This case is not for $1,500. Mr. Gasperini has sued Guidance Associates for $1,500,000. They want you to value each and every one of these 300 and so slides at $5,000 each without proving that he has earned any money from them.

When he took pictures as a photographer down in Central America and sold them to the newspaper that he worked for, he would get $50 a picture. His testimony will establish that.

You heard testimony about the video market and also the computer market for computer games. Yes, Mr. Gasperini's testimony will establish he earned $2,000 back in—I think it was 1987, from the sale of 14 slides for use in an interactive video game.

Actually, the only money he has really earned, real money he's earned from his photography in the last decade has come from Guidance Associates. He has slides of his own he took during the Gulf War. These are the only ones he has given to a stock agency.

None, absolutely none—as far as we know as of **[37]** the date of his deposition—of his slides were given to an agency to market them. He never marketed the slides at all. There was never any demand for it.

But the ones he did market of the Gulf War, the most he earned on the latest figures he's given us over a three-year period is a total of $366 for the use of those slides. Seven pictures were used during that time period. In 1991, he earned a hundred dollars. In 1992, he earned $92. And in 1993, last year, he earned a $174 from the reuse of those slides.

Now, the argument would be he is in a dangerous area in the Gulf War also. The fact is—I think you know it from your common knowledge—there were many, many, many photographers down in Central America at the time of the conflicts down there. Almost every newspaper had pictures of Central America, of the Contras, of the Sandinistas, of the people in El Salvador. There were terrible pictures but there were pictures around. They are still available.

Mr. Gasperini has kept his pictures in his mother's house. He may have distilled some down and given them to us, but in fact, there are copies of those pictures and they are still available. At least 40 of them were given to the high school, Horace Greeley High School in Chappaqua. Those are available and can be used.

[38] You will hear testimony about pictures he sold to a newspaper. Don't go by my recollection, go by the testimony. Only one was reused and each time at $50. And since 1984, '85, '86, there has never been any demands for the use of those pictures.

So, we are saying, he is entitled to compensation but certainly—and we are saying an industry standard doesn't exist—but certainly not in the amounts being sought by the plaintiff.

In fact, what we think the plaintiff is asking you to do is to speculate and to guess what is going to happen in the future some time if Mr. Gasperini at some point in time decides to market pictures.

You have to guess whether there is a demand for it 50 years from now; if somebody is going to pay for a book put together by Mr. Gasperini when there are, I would think, literally thousands of other photographers and hundreds of thousands of other pictures of what happened in Central America available, put in stock houses from other photographers.

So, we are just asking you in this case to use your common sense. You will hear our expert as to what he considers the fact of these slides to be and you will hear their expert. Just take into consideration both experts and use your common sense.

[39] Thank you very much.

THE COURT: All right. Thank you, sir.
Plaintiff may call the first witness.

MR. S. ABADY: Your Honor, before I do, I would like to make a motion at this time.

THE COURT: No motion. Just make—call the first witness. You can make a motion at the next recess. We can't waste time.

MR. S. ABADY: Sorry, your Honor.

THE COURT: Just bring in the next witness.

MR. S. ABADY: The plaintiff calls the president of the defendant, William Goodman, to the witness stand.

WILLIAM GOODMAN having first been duly sworn, was examined and testified as follows:

THE COURT: State your full name for the record please, spelling your last name slowly.

THE WITNESS: My name is William E. Goodman, G-o-o-d-m-a-n.

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. Good morning, Mr. Goodman. My name is—

THE COURT: Forget all that. Just frame the first question. You know what my written directions are. It's not necessary to greet a witness. Just examine the **[40]** witness.

MR. S. ABADY: Yes, your Honor.

THE COURT: Jury knows his name already. Just ask the questions.

MR. S. ABADY: Yes, your Honor. I stand admonished.

Q. Mr. Goodman, you are the president for The Center For Humanities; isn't that correct?

A. Yes.

Q. And that company is also known by the name Guidance Associates?

A. Yes.

Q. You oversee the overall running of the business; isn't that correct?

A. Yes.

Q. And you are a graduate of Princeton university?

A. Yes.

Q. And after you graduated from Princeton, you worked at the McGraw Hill Publishing Company; isn't that correct?

A. Yes.

Q. You began working for The Center For Humanities in 1983 and 1984; isn't that correct?

A. Yes.

Q. This business was started in 1961 by your father; isn't that correct?

[41] A. Yes.

Q. It is a family business?

A. Yes.

Q. Okay. It's a multi-million dollars business; isn't that correct?

A. Yes.

Q. And therefore, several million shares of stock outstanding?

THE COURT: None of this matters. The question is the value of these 310 slides. Just get right to the point.

MR. S. ABADY: Okay.

Q. After you graduated from Princeton you went to Columbia Business School; isn't that correct?

A. Yes.

Q. Okay. Your business at The Center For Humanities for many, many years was making film strips for the educational market in North America; isn't that correct?

A. I was not at the company when it was making film strips.

Q. That wasn't my question, sir.

THE COURT: Don't argue with the witness. Frame the next question.

Q. You are familiar with the company's history prior to working there because it's a family business?

[42] A. Yes.

Q. You know for many years, going back to its inception, the company made film strips?

Q. It subsequently went into the video market when that technology replaced the film strips?

A. Yes.

Q. Over the years your company was a major consumer of stock photography, that is slides or negatives obtained from stock agencies, which are clearing houses or agents that represent photographers?

A. Yes.

Q. And you would purchase or lease the rights to reproduce those pictures in the products that you manufactured; isn't that correct?

A. Yes.

Q. Films and video; isn't that correct, sir?

A. The company would, yes.

Q. When I say you, I am referring to the company, okay.

Now, your company has done work for major Fortune 500 companies in this country such as Sears, General Motors, Ford, Time Magazine, Chrysler; is that correct?

A. Yes.

Q. And your company presently has about twenty employees?

A. Yes.

[43] Q. At one point you had as many as 80 employees?

A. Yes.

Q. Okay. And your employees would deal regularly with stock suppliers of photographic material; isn't that correct?

Q. Okay. And Susan Green, we heard that name mentioned by your counsel—

THE COURT: No, no, none of that. Just simple questions. Whether they heard the name mentioned has nothing to do with it. Get right to the point.

If you want to ask him what Miss Green's position in the company was, just ask him that.

MR. S. ABADY: I apologize.

THE COURT: We are wasting time with these things.

MR. S. ABADY: I am moving as fast as I can, Judge.

Q. Susan Green is a former employee of yours?
A. Yes.
Q. She was employed by you on a free-lance basis to produce a video series Conflicts in Central America; isn't that correct?
A. Yes.
Q. And Conflicts in Central America was a three-part [44] video that was developed around the slides taken by Mr. Gasperini of the wars in Central America; isn't that correct?
A. Yes.
Q. Susan Green had experience in acquiring specialized stock photography and reusing it and reproducing it; isn't that correct?
A. Yes.
Q. Susan Green had experience in acquiring specialized stock photography and revising—reproducing it; isn't that correct?
A. Yes.
Q. I will show you, Mr. Goodman, what I have marked as Plaintiff's Exhibit 1 for the record. That's the marking on the spot. It was previously marked at a deposition. Three film boxes.

THE COURT: Exhibit 1 is a letter agreement dated June 17th.

MR. S. ABADY: I am sorry. Did I say Exhibit 1? I apologize, your Honor. I lost my place.

THE COURT: What number is it that you have there? Is it ten you are talking about?

MR. S. ABADY: I am sorry, your Honor, ten.

THE COURT: Any objection to Exhibit 10?

MR. MONTBACH: No, your Honor.

THE COURT: Received in evidence.

THE CLERK: Plaintiff's Exhibit 10 is received.

MR. S. ABADY: May I approach the witness, Judge?

THE COURT: Any time it's necessary, without [45] asking.

Q. Okay. I show you what's been received in evidence as Plaintiff's Exhibit 1 and ask you if you recognize it.

THE COURT: Ten.

Q. Plaintiff's Exhibit 10.
A. Yes, I recognize it.
Q. Tell the jury what this is?
A. It's a video program about Central America.
Q. Okay. This program contains 110 of Mr. Gasperini's slides of various scenes in Central America; isn't that correct?
A. I don't know the total number.
Q. But you know it contains a substantial number of his slides, correct?
A. Yes.
Q. That's your label?
A. Yes.
Q. I'm showing for the record the videotape itself.
And these videotapes are what you marketed to the educational market in this country?
A. Yes.
Q. Now, you understand, Mr. Goodman, that when you obtain an image to reproduce to film or video you pay a reproduction fee or royalty; isn't that correct?
A. Yes.
[46] Q. What you have referred to as a rental fee; isn't that correct?
A. Yes.
Q. Your company has received thousands of such images and paid such royalty or rental fees in the past; isn't that correct?

MR. MONTBACH: Objection.

THE COURT: Sustained. It doesn't matter. He is bound by the practice.

Q. Okay. And you are aware that a photographer owns a copyright to his or her own original image; isn't that correct, sir?

A. Yes.

Q. You did not purchase Mr. Gasperini's pictures which you then reproduced in this video, you rather gave him a licensing fee in order to produce it. The slides remain his property, isn't that correct?

A. Yes.

Q. And you kept in-house at your company a special computer, graphic equipment in order to reproduce an image, photographic image on film or video; isn't that correct?

A. No.

Q. I will remind you of an instrument that you maintain called Compugraphic. Does that refresh your recollection?

[47] THE COURT: You know, it really wouldn't matter. They lost the slides. The issue for this jury is the value of the slides at the time of the loss. Whether he has a Compugraphic machine or not is of no concern to this jury. The decision they have to make is a decision of how much money. So, let's just cut right to the main issue in the suit because Compugraphic has nothing to do with it.

MR. S. ABADY: Well—

THE COURT: Please, just get right to the value of the lost images.

MR. S. ABADY: Yes, your Honor.

Q. You have more than 10,000 of such slides that you own; isn't that correct?

A. Yes.

Q. Okay. And you have off premises many thousands more; isn't that correct?

A. Yes.

Q. Okay. You have hired photographers to take pictures for your company over the years; isn't that correct?

A. Yes.

Q. Now, you did not personally know of any policies or procedures dealing with these images; isn't that correct?

A. That's correct.

Q. There were no safety precautions in your company for dealing with these images?

[48] A. No specific safety precautions.

Q. There was no designated area where photographic material was kept?

A. No.

Q. Other than your own filing cabinets?

A. Correct.

Q. Okay. And to your knowledge, you have no written guidelines—

A. That is correct.

Q. —to safeguard photographic material?

Okay. But it is possible that a safe was used to store original photographic material; isn't that correct?

A. At some point, possibly.

Q. Okay.

THE COURT: Whether it's okay or not is for the jury to consider. Do not comment on the answers. Please direct yourself to the loss. There is no dispute, as I understand it. You can ask him straight out whether 310 slides were lost.

MR. S. ABADY: I intend to do that, your Honor.

THE COURT: Just do that. That's all you need to know from him.

MR. S. ABADY: Okay, your Honor.

As your Honor well knows, I didn't anticipate that concession in opening statement, so my preparation—

[49] THE COURT: You should've anticipated it.

MR. S. ABADY: —was to cover all our bases.

THE COURT: Did you ask him straight out?

Did your company lose 310 slides?
Would you answer that for me if he won't ask you?

THE WITNESS: Yes, we did.

THE COURT: You admit you are liable for the 310. It's just a question of what their value was at the time they were lost; isn't that right?

THE WITNESS: Yes.

THE COURT: Let's make it simple.

MR. S. ABADY: Okay, Judge. You are making it very simple. Thank you.

THE COURT: That's my job. Get moving.

Q. Okay. Now, you selected Mr. Gasperini in order to produce Plaintiff's Exhibit 10, the video film series, because he was the only person that you knew who had gone to Central America, taken the risks that he had taken, and captured the scenes and photographs that he did; isn't that correct?

MR. MONTBACH: Objection.

THE COURT: Compound question if I ever heard

MR. S. ABADY: I will restate the question.

THE COURT: He may be asked whether he is the **[50]** person who selected this particular photographer.

Q. You have selected Mr. Gasperini because he is the only photographer you knew with his experience; isn't that correct?
A. Yes.
Q. And you believed that his slides were unique; isn't that correct?
A. No.
Q. Do you remember testifying—

THE COURT: Hand the original to the clerk.

Q. Mr. Goodman, you remember meeting me before at your attorney's office down in Wall Street on February 14th of this year?

A. Yes.
Q. Okay. And do you remember being asked the following question and giving the following answer found at page 15.

"Question: Why did you select Mr. Gasperini as opposed to some other journalist based in Central America who had taken photographs or slides of life there?

"Answer: Bill was the only person who I know had done it."

Do you remember that?
A. Yes, but that wasn't the question.
Q. Now, you realized the slides had been lost about one **[51]** month after you completed the video film series; isn't that correct?
A. Yes.
Q. And that was some time around September of 1991; isn't that correct?
A. Yes.
Q. And Susan Green, your former employee who was then employed by you on a free-lance basis, had placed the slides in your office; isn't that correct?
A. Yes.
Q. Okay. And you acknowledged that they were last seen there?
A. Yes.
Q. After that you compelled your staff to engage in a widespread search to try to locate the slides.

THE COURT: Waste of time. Waste of time.

Whether the search was widespread or not is not a matter of concern to the jury. He admits they are lost. He admits he can't find them.

MR. S. ABADY: But your Honor, he wouldn't have dedicated that kind of effort if they weren't worth that kind of money.

THE COURT: That's argument.

MR. MONTBACH: Objection, your Honor.

THE COURT: Maybe he felt embarrassed that they [52] were lost.

MR. S. ABADY: That's for the jury to determine, your Honor.

THE COURT: That's right. He made an effort to find it, didn't you?

THE WITNESS: Yes, I did.

Q. It was a substantial effort, wasn't it, Mr. Goodman?
A. Yes.
Q. It lasted for more than a year, didn't it?
A. Yes.
Q. It involved nearly all of your staff, didn't it?
A. Yes.
Q. It involved searching not only your premises but your storage premises?
A. Yes.
Q. And it also involved searching the company that you used to manufacture your videos; isn't that correct?
A. Yes.
Q. You were desperate to find these slides because of their value; isn't that correct?
A. No.
Q. But you did search for a year—
A. Yes.
Q. —in all those places?

THE COURT: Asked and answered.

[53] Q. You yourself engaged in the search even though you are president of the company.

THE COURT: None of that even though kind of stuff. That makes it an argumentative question. He may be asked whether he participated in the search.

Q. You did participate in the search?
A. Yes, I did.
Q. You in fact were in charge of the search?
A. Yes.

Q. You told your employees to look everywhere, high and low; isn't that correct?
A. Yes.
Q. You told them it's very important to find these slides?
A. Yes.
Q. You sent a memo to your employees about finding these slides; isn't that correct?
A. No. That I don't recall.
Q. It is possible though, isn't it?

THE COURT: Everything is possible around here. No more is it possible questions.

Q. Okay. You do business with a company called Cinematics*?
A. No, I do not.
Q. You never heard of that company?
[54] A. No. Cinemagnetics, is that what you mean?
Q. I may. Is it Cinemagnetics? Forgive me.
A. That's correct, yes.
Q. That's your film warehouse?
A. Yes .
Q. You also searched that company's premises as well; isn't that correct?
A. They searched it for us, yes.
Q. But at your direction?
A. Yes.
Q. Now, Mr. Goodman, you have acknowledged that you felt guilty about losing these slides because they had value; isn't that correct?
A. Yes.
Q. Now, you are aware that your company has paid for the loss of original photographic material in the past, has it not?
A. Yes.
Q. And specifically, you paid the photo stock agency Photo Researchers for the loss of some of its slides; isn't that correct?

MR. MONTBACH: Objection, your Honor.

THE COURT: Overruled.

Q. Isn't that correct?

A. I have been told about that, yes. I was not [55] personally involved.

Q. That was in 1977, wasn't it?

A. I believe so.

Q. Okay. And at the time, you made those payments based upon the industry standard; isn't that correct?

A. I don't know.

MR. MONTBACH: Objection.

THE COURT: He's answered it.

Q. Now, you do pay royalty fees from 500 to $700 for single time use for a photographic product; isn't that correct?

MR. MONTBACH: Objection, your Honor.

THE COURT: I think that has been asked and answered.

MR. S. ABADY: Forgive me, it was not. It was in the opening statement.

THE COURT: Have you paid such amounts?

THE WITNESS: Yes.

Q. And over the years your company has spent tens if not hundreds of thousands of dollars on stock photography royalty payments; isn't that correct?

A. Yes.

Q. And as a result, you have earned many millions of dollars from the more than 10,000 slides on your premises over the years; isn't that correct?

[56] A. Earned what?

Q. Hasn't your company realized revenues in the millions—

A. Yes.

Q. —from the products made from still photography?

A. Yes.

Q. Now, you know Bill Gasperini. You also know his mother, Charlotte Gasperini; isn't that correct?

A. Yes.

Q. Isn't it true that she made a number of telephone calls to you in an attempt to retrieve her son's slides?

A. Yes.

Q. Isn't it true you didn't return those telephone calls?

MR. MONTBACH: Objection. It's irrelevant.

THE COURT: Sustained. The record will show counsel started to stand.

You have to stand up to make your objection, otherwise you can be missed.

MR. MONTBACH: I am sorry.

Q. You didn't acknowledge to Mr. Gasperini or his mother right away of the loss, did you?

MR. MONTBACH: Objection.

THE COURT: I think I have to take it for the reasons stated earlier, but I think that's already been established, hasn't it?

[57] When did you first tell them they were as far as you were concerned lost?

THE WITNESS: I told his mother and Bill at different times, subsequent to the completion of the program, that we were still looking and that I was continuing to search and I was certain they would show up. It was possibly as much as a year had passed when we said we can't find them.

MR. S. ABADY: Bear with me one second, your Honor.

THE COURT: We will take a brief recess at this time. Members of the jury, don't discuss the case. Take a brief recess in the jury room.

You can step down, Mr. Goodman.

MR. S. ABADY: I will be but one minute, your Honor.

(Recess)

THE COURT: Please resume.

MR. S. ABADY: Thank you, your Honor.

BY MR. S. ABADY:

Q. Mr. Goodman, I show you what's been previously marked for identification as Plaintiff's Exhibit 1, which is a letter dated June 17, 1990, to William Gasperini from William Goodman. I will ask you if that's your signature and that's your letter?

[58] A. Yes, it is.

Q. Okay. Underneath the first page is a document of the same date called Letter of Agreement and that is a two-page document for the record.

A. Yes.

Q. It's signed by Mr. Gasperini and David Fredericks.

A. Yes.

Q. You recognize that document?

A. Yes, I do.

Q. Would you tell the jury what it is?

A. It's the basis of the relationship that we had with Mr. Gasperini on the Central America program.

Q. This is your contract with Mr. Gasperini.

A. Yes.

Q. Mr. Fredericks was employed by you.

A. Yes.

Q. In what capacity?

A. He was the Chief Financial Officer of the company.

Q. Okay. You don't dispute he had the authority—

THE COURT: Offer it in evidence. There is no objection to it.

MR. MONTBACH: Your Honor, I would like to see the cover letter. I have the other part. I just want to see—I am sure there won't be.

No objection.

[59] THE COURT: Received in evidence.

THE CLERK: Plaintiff's Exhibit 1 is received.

MR. S. ABADY: Okay. Your Honor, may I—could we have a brief side bar?

THE COURT: No. If you want to read from the document that's in evidence, you may do that.

MR. S. ABADY: Your Honor, I think you will credit me with conscientiousness. I am going to introduce in evidence—I am going to attempt to introduce into evidence an item which may draw an objection.

THE COURT: Is it on the list?

MR. S. ABADY: It's on the list.

THE COURT: Which number?

MR. S. ABADY: Number two.

THE COURT: Why didn't you tell me this when we had the recess?

Hand it to the clerk.

MR. S. ABADY: I will explain my reasons, your Honor.

MR. MONTBACH: Can I have a copy?

MR. S. ABADY: Yes, of course.

THE COURT: I will sustain the objection at this time.

MR. MONTBACH: Objection, your Honor.

MR. S. ABADY: All right. May we be heard at [60] side bar so I can explain the legal theory?

THE COURT: Not at this time. He may be asked any of the underlying facts in there. If he doesn't so testify, then you may be able to renew your offer.

Court assumes that there is an objection to it.

MR. MONTBACH: There is, your Honor.

MR. S. ABADY: Yes.

THE COURT: The objection is sustained.

He may be asked the underlying facts of the letter. If he testifies differently at trial, the letter can be shown to him. Just ask him is it true that.

Take that second paragraph out of the letter.

MR. S. ABADY: But not the third paragraph?

THE COURT: Third paragraph, all right, whatever.

MR. S. ABADY: Judge, I am being conscientious to ask your guidance before—

THE COURT: You can ask him any underlying fact but I am sustaining the objection to the letter.

Q. Okay. Mr. Goodman, I show you what has been marked—

THE COURT: He hasn't shown any lack of recollection. Just frame a simple question and ask him. Is it true that.

Q. Okay. Is it true, Mr. Goodman, the slides that were on loan to your company had been left in the editing studio on May 10th, 1992?

[61] A. I don't know that.

THE COURT: All right. Show him the letter.

Q. Is that your signature on Plaintiff's Exhibit 2?

A. Yes.

Q. And that's a letter you wrote to your representative; is that correct?

A. That's correct.

Q. And in that letter you make the statement that the slides were left in the editing studio; isn't that correct?

A. Yes.

Q. But under oath on February 14th you told me, with the presence of your counsel, that the slides were left in your office; isn't that correct?

A. Yes.

Q. Both things can't be correct; isn't that right, sir?

A. Yes.

MR. S. ABADY: Your Honor, again, in an attempt to be conscientious, I will show you—

THE COURT: No more speeches like that.

Members of the jury, side bar conferences are an awful waste of time.

The Court is sustaining an objection to this type of document unless he denies under oath any truth of the statements set forth therein.

[62] MR. S. ABADY: That's a letter to him. Some of—

THE COURT: Well, some of it says that's what—

I don't know who Mr. Dwyer is but he can be asked. What's the number of that?

MR. S. ABADY: Three, your Honor.

MR. MONTBACH: Your Honor, may I approach the bench? We are getting into an awfully touchy area now if we identify Mr. Dwyer.

THE COURT: How touchy can it be?
Step into the jury room, members of the jury.
Hand the letters to the clerk.

(Jury not present in the courtroom)

THE COURT: You could step down if you don't want to be there while this time is being wasted. You can go or stay as you wish.

MR. MONTBACH: Mr. Dwyer is an investigator for the insurance company.

THE COURT: I understand that but this is a letter which is written to Mr. Goodman, the witness; isn't that right?

MR. MONTBACH: Yes, your Honor.

THE COURT: It sets forth certain facts.

MR. MONTBACH: Yes.

THE COURT: And I suppose he can be asked as to **[63]** the underlying facts. The letter because it involves an insurance company investigation is inadmissible, because in the first place it has no evidentiary value standing alone, it's all hearsay. And secondly, it tends to be prejudicial when you bring up issues of insurance.

I just don't understand why you have this witness on there at all. He said everything he knows already.

MR. S. ABADY: Bailors have a right under New York law to bring third-party beneficiaries direct claims against the carrier.

This case could have been directly against this defendant and its insurer at the same time. I believe as a result of that that there is—the prohibition—the ordinary prohibition about introduction of insurance company documents does not apply.

THE COURT: I am adhering to my ruling. The insurance company document can be used to refresh the recollection of the witness. The underlying facts set forth therein can be brought out, but the documents themselves, I am sustaining the objection to the exhibit.

MR. MONTBACH: I was only worried about identifying Mr. Dwyer, asking that question.

THE COURT: Well, I have no idea who Mr. Dwyer is.

MR. MONTBACH: He is an insurance investigator.

[64] THE COURT: I know that but I am sustaining the objection to anything to do with the insurance company.

May I say, Mr. Abady, this is a childishly simple case. Only issue here is how much money. If you will cut directly to that, maybe the jury would be more appreciative, than dawdling around with Mr. Dwyer. Whether they were lost in his office or somebody else's office, it's clear he is liable. That's conceded. It's just a question of how much money these lost slides were worth at the time and place of the loss.

MR. S. ABADY: Your Honor, I take it under 58 (2) you would enter a directed verdict as to the issue of liability?

THE COURT: No question about that, is there?

MR. MONTBACH: We are conceding we lost the slides. We are conceding that we lost the slides. There is no doubt about that.

THE COURT: You are conceding you received the slides as bailment, are you not?

MR. MONTBACH: Yes.

THE COURT: So, that supports a judgment on the issue of liability.

MR. MONTBACH: On the issue of liability, yes.

THE COURT: Only issue to be tried to this jury is how much money the slides were worth at the time and [65] place they were lost.

MR. MONTBACH: Yes.

MR. S. ABADY: For clarity of the record, that concession is liability on all four causes of action?

MR. MONTBACH: No, your Honor.

THE COURT: No, on the bailment.
What are the others?

MR. S. ABADY: If you look at my pretrial brief, your Honor, you will see that both under contract and tort for negligence and conversion, as a matter of law that conception means that all four causes of action.

THE COURT: You are only going to the jury on the bailment. The rest are superfluous. Also, there is no basis here for punitive damages.

MR. S. ABADY: We withdraw the punitive damages claim, your Honor.

THE COURT: You are going to the jury on bailment.

MR. S. ABADY: You only get it on gratuitous bailment, not on value.

Your Honor, if I recall the witness—I will finish the question for this witness, then, if I may interrupt this testimony, we have two witnesses waiting.

THE COURT: I can interrupt his testimony right now and get them on here. We have little time left. [66] There will be

cross-examination and the Court's practice ordinarily is not to limit cross-examination to the scope of the direct as to a party witness, but of course, the attorney has a right to refrain and then recall him on the defendant's case, if that's what he wants to do.

MR. S. ABADY: We have two witnesses who are only available today.

MR. MONTBACH: Which witnesses are these?

THE COURT: Bring them in here. You knew that an hour ago. You are dawdling around with all this.
Step down, Mr. Goodman.

MR. MONTBACH: Can we know which witnesses they are?

THE COURT: We will know. I am taking him.

MR. MONTBACH: He named two witnesses.

THE COURT: Who are the witnesses?
Which one is coming first?

MR. S. ABADY: The first witness would be Robert Zentmaier. The second witness—

THE COURT: That's the extra witness which was not named?

MR. MONTBACH: I will object to that.

THE COURT: How do you justify bringing in a witness that's not named?

MR. S. ABADY: I can justify it directly, your [67] Honor. In pretrial discovery it was asked and we have sought document production for the documents that you have heard about, all of the delivery memos, all of the business records that show this company was well-aware of the industry standard. Zentmaier is on the other side of the transaction. We have had to do our own digging. We have just found him a few days ago. We have just found documents proving that they have received it.

THE COURT: You can take exception.

MR. MONTBACH: I have an exception. This is trial by ambush.

THE COURT: We are not having trial by ambush.

MR. MONTBACH: This is an expert witness they are trying to put in here.

MR. S. ABADY: He is not an expert witness.

MR. MONTBACH: This is not a named expert.

MR. S. ABADY: This is not an expert witness, your Honor.

THE COURT: I understand that.
Bring him in here. Bring him in here right away.

(Jury present in the courtroom)

THE COURT: Members of the jury, in the interest of time and also in the interest of fairness to nonparty witnesses, we are going to take a witness out of turn. We have not finished with the testimony of Mr. Goodman and he [68] will come back.

You are instructed that it makes no difference to you what order the witnesses testify in. Try to keep the testimony straight in your mind, best of your ability to do so.
Where is the witness?

MR. S. ABADY: Mr. Abady went to get him now.
I will call the other witness.
For the record, your Honor, plaintiff calls Mrs. Susan Green to the witness stand.

SUSAN GREEN having first been duly sworn, was examined and testified as follows:

THE CLERK: State your full name for the record, please, spelling your last name slowly.

THE WITNESS: Susan Green, G-r-e-e-n.

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. How old are you, Miss Green?
A. Excuse me?
Q. How old are you?
A. 52.
Q. Where do you reside?
A. 10 Old Pound Road, in Pound Ridge.
Q. Could you tell the ladies and gentlemen of the jury [69] your educational background?

THE COURT: Is it necessary?

MR. S. ABADY: It will take but a moment, your Honor. My entire examination will take no more than five minutes.

THE COURT: All right. Go ahead.

A. I have a B.A. in American history from N.Y.U. and M.A. in American history from Columbia.
Q. Okay. Are you here today pursuant to subpoena?
A. Yes.
Q. Okay. Where did you work?
A. I worked for Guidance Associates.
Q. Prior to that, did you work for any other publisher?
A. I worked for American Heritage Publishing Company and Apprentice Hall Media.
Q. In what capacity?
A. At American Heritage I ended up as associate editor and at Apprentice Hall Media I was producer and writer.
Q. How long did you work for the defendant in this action?
A. About five and a half years I think, yes.
Q. What was your job in connection with what has been received in evidence as Plaintiff's Exhibit 10, which I will show you a copy of, entitled Conflict in Central America?
[70] A. I was the—I edited the scripts that I received from Bill Gasperini and I worked on the selection of the visuals and oversaw the entire production of the program.
Q. How long did it take to produce the program?

A. I guess I worked on it less than a year. I can't—I can't really be more specific. I would say less than a year, not working on it all the time.
Q. Was Mr. Gasperini interrupted in working with you on the program?
A. What do you mean interrupted? Was he not there?
I only worked with him sporadically. I worked with him personally maybe four or five days.
Q. And the last time you worked with him, was he then shipped over to the Persian Gulf?
A. I believe that was the last time I saw him.
Q. Okay. Did you always maintain the slides—his slides at the premises of the defendant?
A. Yes.
Q. Did you ever take them outside?
A. No.
Q. You have been working in media since 1980; is that correct?
A. That's right.
Q. What was your opinion of the quality of Mr. Gasperini's work?
[71] A. I thought the pictures were wonderful.
They were very good.
Q. Was there any dissension in the company regarding that?
That is, was there anyone that had a differing opinion at The Center For Humanities regarding the quality of Mr. Gasperini's photography?
A. Not that I am aware of.

MR. S. ABADY: No further questions, your Honor.

THE COURT: Is there any cross-examination?

MR. MONTBACH: Very brief, your Honor.

CROSS EXAMINATION

BY MR. MONTBACH:

Q. When you were working on this video, from whom did you receive the slides?

A. I believe I received them from Marilyn Young, who was the Executive Editor. She was the person to whom I reported.

Q. Okay. And in what condition did you receive those slides?

A. They were in sleeves, in standard sleeves, like I think 20 to a sleeve, and they were in a plain or manila envelope with the scripts in there.

Q. Did you receive a list of the slides?

A. No.

[72] Q. Did you receive any written description of what the slides were?

A. No.

Q. What did you do when you received the slides?

A. I kept them in my office until I needed to work with them. I reviewed them as the project got more involved. First, I edited the scripts, and after I edited the scripts, I made my selections of those slides that I wanted to use.

I went over them with Mr. Gasperini and we discussed them. And for looking at them, I would've put them in a carousel, you know, slide carousel, so we could look at them with a viewer. And they stayed in the carousel while we shot them onto video, we transferred them onto video. Once they transferred to video, I never used the slides again because video was the medium that we were working with.

Q. The three tapes that you have in front of you, are those made up solely from Mr. Gasperini's slides?

A. No, no.

Q. What else are they made up from?

A. There are some archival footage in there.

Q. Where did you obtain that?

A. Those are from materials that Guidance owned and from the National Archive, Universal news reels. The news [73] reels that Universal Pictures used to make, they were in the—they are in the public domain.

Q. Those are in the public domain?

A. Yes. The archival footage that Guidance owned we had the rights to use.

Q. Did you use any video footage from any other source?

A. I don't believe so.

I can't—I don't recollect ever—no.

Q. You say archival photographs, are these photographs or these are archival films or something like that?

A. Both. There were some films, mostly film.

Q. Mostly film?

A. The idea was to get some life action into the program so that it wouldn't be all stills.

Q. Are these films?

A. And—excuse me. It was also interspersed with an interview I did with a professor at City College.

Q. And the films that you used, were they historical films, I am saying going back before 1980, or are these during the period 1983 through 1990?

A. No. I would say most of the—90 percent that would be old. Yes, the current material were the slides.

Q. The slides.

A. But I have to say, I haven't looked at this, so—

THE COURT: You mean you have never looked at it?

[74] THE WITNESS: I haven't looked at it.

Q. Recently?

A. Recently, but I don't think there is anything new in there.

Q. Okay. And after you finished putting that together, what did you do with the slides?

A. With the slides, I had the slides in my office. I had a credenza where I kept all that material. And I think we finally finished with this project in March or April, something like that, and I put the slides in this credenza in a—I believe it was a padded manila envelope and it had Bill's name on it and I kept them there. Then, at the end of May, I was let go from Guidance Associates.

Q. May 1991?

A. Yes. But I kept my office there and I stayed on doing free-lance work till late June or July, and I would be—intermittently, I will be in and out of the office. I kept my office intact.

Somewhere I think around the end of June or the beginning of July, I am not sure exactly which, I was asked to come in and clean the office out because they needed the space. And I went in and in the course of that found this package of slides, which I gave to Will Goodman and asked him if he would give them to Bill because I knew that they had had some connection.

[75] THE COURT: What date was this?

THE WITNESS: This was probably the end of June or the beginning of July.

THE COURT: Of what year?

THE WITNESS: 1991.

THE COURT: And how many slides?

THE WITNESS: I think there were about 300. They were all in sleeves, so I would say—and there were 20 to a sleeve. Ten to 15 sleeves doesn't sound out of the ordinary. I couldn't swear that's how many there were but that's how many it seemed that there were. And I gave them—I put them in Will's office, either on a chair or a table. I am not sure which.

The office was very hectic. They were marking up a lot of things to put in storage. There was a great deal of commotion at that time just in the moving, in the consolidation of the office.

Q. The office was shrinking in size?

A. Yes. I believe that half the floor was being given up, so there was a lot of commotion and a lot to do.

Q. That's the last you saw those slides?

A. That's the last I saw the slides.

MR. MONTBACH: Thank you. No further questions.

THE COURT: Any redirect?

MR. S. ABADY: Very briefly, your Honor.

[76] REDIRECT EXAMINATION

BY MR. S. ABADY:

Q. Bill was listed as the photojournalist in the film series; is that correct?

A. I believe so, yes.

Q. Okay. And none of the archival material, that is the film footage as opposed to Bill's still shots, depicted the same images as the images in Bill's photographs?

A. To the best of my recollection, no.

MR. S. ABADY: Thank you very kindly.
No further questions.

THE COURT: Finished with the witness?

MR. MONTBACH: Yes, your Honor.

MR. S. ABADY: I did, your Honor.

THE COURT: Thank you, Miss Green. You are excused.

THE WITNESS: Okay.

ROBERT ZENTMAIER having first been duly sworn, was examined and testified as follows:

THE COURT: State your name and spell your last name for the record.

THE WITNESS: My name is Robert Zentmaier. That is spelled Z-E-N-T-M-A-I-E-R.

DIRECT EXAMINATION

[77] MR. J. ABADY:

THE COURT: Go right ahead.

MR. J. ABADY: Thank you, Judge.

Q. Mr. Zentmaier, are you presently employed?
A. Yes, I am.
Q. Where are you employed?
A. I am employed at Photo Researchers in Manhattan.

Q. What is your position with Photo Researchers?
A. I am president.
Q. How long have you worked for Photo Researchers?
A. I have been there since 1968.
Q. How long has Photo Researchers been in business?
A. The company was started in 1957.
Q. Would you explain to the members of the jury what type of business Photo Researchers is?
A. It's a stock photography agency. We represent photographers. We maintain a file of their photographs and we sell the reproduction rights to various commercial buyers, editorial buyers and advertising buyers.
Q. Mr. Zentmaier, where do you—withdrawn.
Mr. Zentmaier, how many images does Photo Researchers have?
A. We have about a million.
Q. And where do you keep those images?
A. We keep them in our offices on 56th Street in [78] Manhattan.
Q. How many professional photographers do you presently represent?
A. We represent around 250 active photographers, plus we hold the works of another 15 to 1700 photographers where either they are deceased or they had some few images that we felt we needed to round out the files, to fill gaps in the files.
Q. Do you maintain photographs of photographers who are deceased?
A. Yes, we do. We find that the sales potential of a photograph does not diminish with the death of the photographer. In fact, we have some photographers whose work has actually increased in the sales potential. There is one gentleman—

THE COURT: I don't think we need to get into that. Just get right to the point.

MR. J. ABADY: Judge, I think it might be an issue.

THE COURT: We are not concerned with a dead photographer. Can't we stick to the case? Can't we get right to the point?

MR. S. ABADY: Goes to the issue of valuation, your Honor.

THE COURT: Please proceed.

[79] Q. Is it common industry practice to maintain the photographs of a photographer for a long period of time?

MR. MONTBACH: Objection.

THE COURT: Sustained, relevance.

MR. S. ABADY: Can we have a side bar, your Honor?

THE COURT: No. Side bar conferences delay the trial.

Q. Mr. Zentmaier, can you tell the members of the jury how many competitor stock agencies there are?
A. There are approximately 80 significant agencies in the country.
Q. And can you explain your responsibilities as president of Photo Researchers?
A. I administer all aspects of the company.
Q. And what is the relative size of Photo Researchers compared to other stock agencies?
A. We are one of the largest in the editorial area, selling the textbooks, encyclopedias.
There is an advertising—one which specializes in advertising sales that are larger than we are but we are, I would say, in the top ten percent.
Q. Mr. Zentmaier, I am showing you now what's been marked as Plaintiff's Exhibit 27. I ask you to take a look at that.

[80] MR. J. ABADY: There is only one copy.

A. It is the package directory of photo agencies. It's a trade organization that agencies belong to if they meet certain requirements in size and ethical responsibility.
Q. Does that list all of the various stock agencies that you referred to earlier?
A. Yes.
Q. And are you familiar with that?
A. Yes, I am. I might have been off on the quantity. I think there is around 80.

Q. Is that book used in the industry to list the various stock houses that hold still photography?

A. Yes.

MR. MONTBACH: Objection.

THE COURT: I will let his answer stand. The book has not been offered.

A. Yes.

MR. J. ABADY: Judge, at this time, I would move Plaintiff's 27 into evidence.

MR. MONTBACH: I object, your Honor.

THE COURT: Sustained, at least at the present. The Court will discuss its ruling later with counsel.

MR. S. ABADY: Very well, Judge.

Q. As president of one of the larger stock houses in the country, are you familiar with the industry practice?

[81] A. Yes.

MR. MONTBACH: Objection. What practice?

THE COURT: Well, you will soon learn if you will wait.

Q. Are you familiar with the industry—

THE COURT: Is there a practice is the question. Is there a practice concerning—

A. There are standard operating procedures.

Q. And those govern the stock photography industry; is that correct?

A. Yes.

Q. The selling and licensing of slide transparencies and images?

A. Yes.

Q. And do you have knowledge of the practice of other stock agencies?

A. I know how some of them operate through meetings, et cetera.

Q. How many different companies, publishers, film companies, agencies, book authors does Photo Researchers deal with in a year?

A. Over a thousand.

Q. And what type of companies do you sell your images to?

A. Well, textbook publishers, encyclopedia publishers, magazines, ad agencies, corporate buyers directly.

[82] Q. Do you have occasion to sell still photography and still images to the computer industry?

A. Yes, more and more with the advent of the CD Rom and other technology.

Q. Can you explain to the members of the jury how still photography is used in that particular technology?

MR. MONTBACH: Objection.

THE COURT: Sustained. It doesn't matter. The jurors can use their common sense that still photography can be used in CD Rom.

Q. Mr. Zentmaier, have you ever met William Gasperini?

A. No.

Q. Are you familiar with his work?

A. No, I'm not.

Q. I want to talk to you a little bit about the fees.

THE COURT: No, no. No introductory comments. Just frame a question.

Q. What's the range of fees that can be earned by selling an image for one time use?

MR. MONTBACH: Objection.

A. Depends how it's being used. Could be anywhere from a little over a hundred dollars for an editorial fee to many thousands of dollars for an advertising use.

We are currently negotiating a fee that will be over $30,000 for use of photograph advertisement.

[83] MR. MONTBACH: Objection. Move to strike.

THE COURT: I will let it stand. However, don't volunteer information.

THE WITNESS: Yes, sir.

Q. What does this range depend on?

A. Exposure.

Q. When you say exposure, what do you mean?

A. If it's used in a textbook, a typical high school textbook, a quarter page or less might be $160. If it's larger, it would be more expensive. If it's the cover would be more still. If it's promotional use, it's more than that. Promotional uses are negotiated individually.

Q. Is it uncommon for a slide transparency to sell for several thousand dollars for one time use?

MR. MONTBACH: Excuse me, would you repeat the question?

THE COURT: Asked and answered.

MR. J. ABADY: I withdraw the question, Judge.

Q. You mentioned—

THE COURT: Whatever he mentioned the jury heard. We don't allow that type of questioning. It's repetitious on its own.

MR. J. ABADY: I apologize, Judge.

THE COURT: Just simple questions.

MR. J. ABADY: Yes, Judge.

[84] Q. How are the million slides that you have in your premises catalogued?

A. They are filed by subject.

Q. And how many subjects are there and what would some of the examples of those subjects be?

A. There would be thousands of subjects. They are filed—we have a natural history area to be filed by the animal species. We have the science area. They will be filed by the

scientific subject. We have files of people, places and things. They will be filed by location perhaps or by industry.

Q. Mr. Zentmaier, do you file slide transparencies by photographer?

A. No, we don't.

Q. Why is that?

A. Because the requests don't come in that way. They come in, they want a specific subject. They don't really care who took the image.

Q. How long do you keep images in stock?

A. It would depend on the image. If it's an image showing for instance the street seen, it might outdate itself after four or five years because the fashion changes or cars getting outdated or buildings coming down.

If it's a nature photo, we might hold it for many years as long as the film stock is viable.

[85] We have historic photos also which come up, you know, indefinitely.

Q. And could you tell the members of the jury the type of value that historical photos and still photography has when it has historical content?

A. Well, anytime anything happens that's relevant to the event, like pictures of John Kennedy, the anniversary of his death, are still in demand. When Jackie recently died there was demands on the Kennedy collection of images.

Q. So, there is a recurrent or cyclical use of those images?

A. Yes, there is.

Q. Is that true of historical photographs?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. It can be. It depends on the subject.

Q. And is that—when we say does it have cyclical value, can you explain to the jury what we mean by that?

A. Like the anniversary of D-Day, we suddenly had demands for the photographs of D-Day which had been sitting in the files for ten years with very little interest.

Q. That means you would be requested to supply that image repeatedly?

A. Yes, yes.

Q. You will sell it repeatedly?

[86] A. We will sell the same image repeatedly.

Q. Is repeated use something that's common in the industry practice?

A. Yes. We sell one time non-exclusive rights in most cases.

Q. How long might a slide or a still photograph sit dormant before it is used?

MR. MONTBACH: Objection, your Honor.

THE COURT: If he can answer it.

A. Well, there is no specific answer. We have had some—

THE COURT: If you can't answer it, just tell him you can't answer.

MR. J. ABADY: I would like the complete answer because I think this is important.

THE COURT: No. Frame the next question.

Q. Is it typical that a slide could remain in your files for five or ten years without use and then suddenly enjoy a very active use?

MR. MONTBACH: Objection.

THE COURT: If he understands the question, he can answer it.

A. Every day we sell images that have been in the files for many years, not sold before. I don't define that as active but they will sell after many years, yes.

[87] Q. Does the prior sales history of a photographer affect the price at which an image or a fee is generated?

A. Not with Photo Researchers.

Q. And is that true also of other stock agencies in the industry?

MR. MONTBACH: Objection.

Q. If you know.

THE COURT: If he knows.

A. With most of them that's true. There are certain photographers of great note, whose work is priced higher.

Q. But that represents a minority of the industry?

A. Very much so.

Q. Does the prior sales history of a particular image bear any relationship to the frequency with which an image might sell in repeated sales?

MR. MONTBACH: Same objection, your Honor.

THE COURT: If he knows.

A. It does. The photo that sold many times before tends to sell again.

Q. And if an image is difficult to obtain or taken under difficult conditions, does that affect the value of the slide?

MR. MONTBACH: Objection.

THE COURT: Again, if the witness understands the question.

[88] MR. MONTBACH: It's a compound question, your Honor.

THE COURT: Subject to cross-examination.

MR. MONTBACH: It's a compound question, your Honor.

THE COURT: It is a little compound.

MR. J. ABADY: I will withdraw the question and rephrase it.

THE COURT: Also, keep out the qualitative words.

MR. J. ABADY: Yes, Judge.

Q. If an image is taken under difficult circumstances, that is it is difficult to recreate, does that affect the value that the image will bear on the market?

MR. MONTBACH: Objection.

THE COURT: If he understands the question, he can answer.

A. In editorial sales the answer is no.

In advertising sales the person negotiating the price will take that into consideration and try to get some more money for it.

Q. Mr. Zentmaier, what type of paperwork is generated by your company and other stock agencies when a slide is sent out from the premises?

A. Every photo that leaves the files is accompanied with what we call a delivery memo.

[89] Q. Can you explain to the members of the jury what a delivery memo is?

A. It states who the slides are going to, briefly what the subject matter is, and the numbers that the agency has assigned to the photo. That's on the front. And on the reverse there is some terminology explaining how they are supposed to be used, copyright restrictions, loss and damage.

Q. Are there standard terms and conditions printed on the back of every delivery memo?

A. Yes.

Q. Is one of the standard terms and conditions—does one of the terms and conditions concern liability?

MR. MONTBACH: Objection, your Honor.

THE COURT: Sustained on the best evidence rule.

Q. Mr. Zentmaier, I am showing you what's been marked as Plaintiff's 13 in evidence and ask you to take a look at it and tell me if you recognize it.

MR. MONTBACH: It has not been marked in evidence.

Q. I ask you to take a look at that and tell the Court and members of the jury if you recognize it.

A. This is a Photo Researchers delivery memo.

Q. Is that a delivery memo from your company?

A. Yes.

[90] Q. And is that kept in the regular course of your business practice?

A. Yes, it is.

Q. And does that have standard terms and conditions printed on the reverse side?

A. Yes, it does.

Q. Does one of the standard terms and conditions concern liability?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Does that document contain—

THE COURT: Are you offering the document?

MR. J. ABADY: Yes, Judge, I am offering the document.

THE COURT: All right.

MR. MONTBACH: Objection.

THE COURT: I am afraid I will have to hear the objection. Can I see the document?

(Jury not present in the courtroom)

THE COURT: It's being offered, as I understand, solely to prove the existence of this claimed practice. And I suppose that it can be received for that purpose but the Court would have to tell the jury that's all it's received for and that there was no such memorandum used in connection with the transaction in this case.

[91] MR. MONTBACH: It has nothing to do with this

THE COURT: It shows—it may show—

MR. MONTBACH: Photo Researchers does this. That's all. They had nothing to do with this case.

THE COURT: It may show that such a practice exists in the industry.

MR. MONTBACH: It shows that Photo Researchers had terms on their document.

THE COURT: That's all it shows. I think I will receive it for that limited purpose.

MR. MONTBACH: Exception, your Honor.

MR. J. ABADY: Your Honor, for the record, we can lay additional foundation. That document has been sent repeatedly to this defendant.

MR. MONTBACH: Not in this case.

THE COURT: I know not in this case but that can be proved.

(Jury present in the courtroom)

THE COURT: Members of the jury, this particular document is received for a very limited purpose; namely, for whatever consideration you think proper as to whether some disputed industry practice actually exists.

You ought to understand that this memo or a delivery memo of this sort was not used in this existing **[92]** transaction that's being sued on here today. It's only to show you whether there is such a practice in the industry and for whatever consideration that may bear on the case. The Court will instruct you as to these disputed matters at the end of the trial.

You can read that clause from it, then move on to something else.

Q. Would you please read—

THE COURT: No, you read it. Attorneys read from documents which are in evidence.

MR. J. ABADY: I am reading now under the section marked terms of delivery of goods.

Item number four, document states, "The monetary damage for loss or damage of original color transparency or photograph shall be determined by the value of each individual photograph. Recipient agrees, however, that the reasonable

minimum value of such lost or damaged photograph or transparency shall be no less than $1,500.

"Photo Researchers agrees to the delivery of the goods herein only upon the express covenant and understandings by the recipient that the terms contained in this photographer are material to this agreement. Recipient receives full liability for its employees, agents, assignees, messengers, and for misuse of the photographs."

[93] Q. Are those the terms contained in that document?

A. Yes, it is.

Q. Does that specific language appear a second time in the same memo?

A. It's for the conditions of use also.

Q. So, the same language appears twice?

A. Yes.

Q. If you know, is that term standard in the industry practice?

MR. MONTBACH: Objection.

THE COURT: If he knows.

A. Other photo agencies use very similar terminology.

Q. Do they all contain the industry standard of $1,500, if you know?

MR. MONTBACH: Objection.

THE COURT: Sustained as to the form of the question. He may be asked whether he has any knowledge as to what numbers other agencies used.

A. There are some that use a different figure.

Q. What would that different figure be?

A. $2,000.

Q. Do you know of any stock agency that transmits and delivers still photography, specifically slide transparency, that does not use a delivery memo?

A. No, I don't.

[94] Q. Do you know of any stock agency that uses a delivery memo that does not include the type of term that you just described?

A. No, I don't.

Q. Mr. Zentmaier, has Photo Researchers done business with Guidance Associates or The Center For Humanities?

A. Yes, it has.

Q. What type of business have you done with the defendant corporation?

A. We have leased them reproduction rights to photographs.

Q. When did you first begin dealing with Guidance Associates, the Center For Humanities, the defendant in this action?

A. In the mid-'70s some time. I don't know exactly the date.

Q. Did you do business with them in the 1980s?

A. Yes.

Q. Did you continue to do business with them in the 1990s?

A. Yes.

Q. Has Guidance—has the defendant ever lost slide transparencies that you provided them with?

A. There was a loss many years ago, back in the '70s.

Q. I would like to show you now what's been marked 12-A, [95] Plaintiff's 12-A.

MR. MONTBACH: May I have a copy?

MR. J. ABADY: Yes.

MR. S. ABADY: Your Honor, may we move on?

THE COURT: Don't wait for me. I thought he was looking at the document.

MR. J. ABADY: I was looking for a copy, Judge. I will try to locate that.

Q. Do you recognize that document?

A. Yes, I do.

Q. Can you tell the members of the jury what it is?

A. Well, it's the invoice that we sent back in October 1977 for the loss of 7—7 images.

Q. Who was—who lost the images?

A. Well, it was sent to The Center For Humanities.

Q. Is that the same center that's defendant in this action, if you know?

A. To the best of my knowledge.

Q. And were you compensated—the invoice that you have there, does that have the same terms and conditions as your delivery memo that you just described?

A. Maybe substantially the same. This was 1977, so they get modified periodically.

Q. Does it have the same industry standard of $1,500 written on the back?

[96] A. Yes, it does.

Q. Can you tell the members of the jury how much the defendant paid for those slides at that time?

A. For four of them they paid $750 each and for three additional ones they paid $1,500 total, so $500 each.

Q. And can you tell the members of the jury what types of photos they were?

A. Very generic kind of things. They are described as signs over lunchroom, cafeteria, PTA room.

Q. That payment was made more than 15 years ago?

A. Yes.

Q. In addition to losing transparencies, has the defendant ever purchased transparencies, slide images from your company?

A. Yes, they have.

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Well, have you ever done—have you done additional business since that loss occurred with the defendant?

A. Yes, we have.

THE COURT: As I understand it, that 1977 loss was not paid in accordance with the memorandum received; is that right?

THE WITNESS: That is correct.

Q. Well, when you say in accordance with the memorandum [97] received, was the money paid negotiated from the industry standard which appears on the back?

MR. MONTBACH: Objection.

THE COURT: I don't know if he remembers but it looks to me as if the amount on the receipt and the amount paid are different; is that right?

THE WITNESS: Yes, that's right.

THE COURT: All right.

THE WITNESS: The amount on the terms of delivery are different from what they paid, yes.

THE COURT: All right.

Q. How is that kind of loss typically negotiated, with what reference point?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Following that transaction and loss, did your company do business subsequently with the defendant?

A. Yes.

Q. And I am showing you now what's marked Plaintiff's 12-B and C in evidence, ask you to take a look at that, see if you recognize it.

A. Yes, I do.

Q. And can you tell the members of the jury what that is?

A. Well, they are computer-generated reports showing submissions that were made to the center in 1986.

[98] MR. J. ABADY: I would offer them into evidence at this time, Judge.

MR. MONTBACH: For what?

THE COURT: Hand it to the clerk.

MR. MONTBACH: Your Honor, I am not sure what he is offering in evidence.

THE COURT: I am not either. That's why I have asked him to hand it to the clerk.

MR. MONTBACH: They are not on the exhibit list and I don't have a copy of it, your Honor.

THE COURT: Show them to counsel. As far as I am concerned, I think I would sustain the objection.

MR. MONTBACH: I make the objection, your Honor.

THE COURT: He has answered he did do business since 1977.

Q. Showing you what's been marked now Plaintiff's 12-D in evidence, ask you to take a look at that.

MR. MONTBACH: Objection, your Honor. He keeps saying in evidence. These aren't in evidence.

THE COURT: Well, I have sustained the objection to these documents on the grounds of relevance.

MR. MONTBACH: This is a new one. He keeps saying it's in evidence.

THE COURT: Hand it to the clerk. Is it on the exhibit list?

[99] MR. J. ABADY: I believe it is, your Honor.

MR. MONTBACH: No.

MR. S. ABADY: Exhibit 12 says invoice and correspondence from Photo Researchers for The Center for Humanities, dated February 2, '77 and October 31, '77. We have simply for—

MR. MONTBACH: Which is 12-A?

MR. S. ABADY: —for ease of reference for the jury separately identified the correspondence and the invoice.

THE COURT: I think he has already—well, I suppose this may be admissible.

MR. MONTBACH: Your Honor, that's 12-A. I haven't seen that. I don't know what 12-D is.

THE COURT: Please take a look at it. I am looking at 12-D. I would like everything to be in accordance with the number. It will be received soleiy for the fact of the transaction, that's all.

MR. MONTBACH: Your Honor, this is a 1986 document.

THE COURT: I understand that. That goes to the weight. Objection is overruled. Received in evidence. Please move along.

THE CLERK: Plaintiff's Exhibit 12-D is received.

Q. Mr. Zentmaier, can you tell the members of the jury **[100]** what that document is?

THE COURT: No, no. It speaks for itself. Go on to something else. It shows they had a transaction.

Q. I would like to show you now what's been marked Plaintiff's 12-C and 12-F for identification purposes.

MR. MONTBACH: 12-E and F?

MR. J. ABADY: C and F.

MR. MONTBACH: C has already been denied.

MR. J. ABADY: I'm sorry. It's 12-E. I misread it.

Q. Ask you if you recognize those documents?
A. Yes, I do.
Q. Are those business records from your company?
A. Yes, they are.

Q. Are there check stubs attached to those documents?
A. Yes, they are.
Q. Who are those check stubs from?
A. Well, they are from the center. A variety of companies are listed including the center and I guess other affiliates.
Q. That's the defendant in this case?
A. Yes.
Q. And it is located on that document industry standard of $1,500?

[101] A. That is correct.
Q. Is that located in the same place on each of those documents?
A. Yes, it is.
Q. I would like to show you now what's been marked 12-G and H for identification.

MR. MONTBACH: Your Honor, I am going to renew this objection. We have had number 12 on the exhibit list. I have not been given copies of any of these things. Two documents dated February 2nd and October 21st of 1977.

THE COURT: I have not seen these documents either. Please hand them to the clerk.

MR. J. ABADY: Judge, I had copies made but I am having difficulty locating them. I will get them to counsel.

THE COURT: That may well be true but unless the attorney can see them, we can't form a conclusion.

I think I have to suspend at this time with the witness. You have to return Wednesday morning at 9:30, is that right? 9:45.

THE WITNESS: Okay.

THE COURT: You can step down.

Members of the jury, thank you for your attendance. You are excused for the balance of the day. Keep an open mind and don't discuss the case. Please **[102]** return 9:45 Monday morning. Tuesday you are not on jury duty, 80 you have to go

about the regular affairs of your life. If you have to work, you have to go to your job.

Thank you very much. You can withdraw from the courtroom.

(Jury not present in the courtroom)

THE COURT: Copies of these have to be found and furnished to the attorney.

MR. S. ABADY: We will do it forthwith, your Honor.

THE COURT: Wait until the jury leaves.

There is a problem with this because there is no receipt in this particular case and the Court took the position earlier which is still my position, that the existence of such a practice may be some evidence as to value but it's certainly not binding. And the rule of law in the case as stated earlier is the market value of the goods at the time of their destruction or loss.

Now we have testimony from this witness called by the plaintiff that on the occasion when this did arise, the consignee, which is the defendant in an unrelated matter, didn't pay the full amount. So, where is it all going? It seems to me it's kind of a useless exercise. They have it in their bill of lading but they don't enforce it.

[103] MR. S. ABADY: Judge, if I may respond. These documents prove two things. One, they prove the ongoing relationship with the stock agency as to its dealings with the industry standard. Two—

THE COURT: He doesn't pay.

MR. S. ABADY: There is no such delivery memo in this case because Mr. Gasperini would not have had occasion to do so, in that, he physically took the slide material there because he worked on the premises as an editor.

THE COURT: Then the whole thing—

MR. S. ABADY: These are clearing houses for the photographers they represent. Mr. Gasperini delivered his own documents.

THE COURT: But he doesn't have the document.

MR. S. ABADY: His own slides, I misspoke.

THE COURT: On these slides he doesn't have the document and the evidence is that even when slides were lost, this alleged industry standard was honored in a breach.

MR. S. ABADY: No, your Honor. In fact—

THE COURT: That's the testimony.

MR. S. ABADY: He stated an objection to the line of questioning Mr. Abady tried to elicit from the witness, which was that the industry standard is always the point [104] of reference for negotiation because—

THE COURT: Then it's useless, isn't it?

MR. S. ABADY: Because of the costs involved in seeking legal remedies in court.

THE COURT: If it's not industry practice, it's not industry practice unless the people in the industry follow it, and the evidence here affirmatively brought out by the proponent is on the one occasion when it occurred, they didn't follow it.

MR. J. ABADY: Judge, may I be heard very briefly?

THE COURT: Very briefly.

MR. J. ABADY: There are a number of issues in contest here. One of the issues is whether an industry standard exists. The defendant is taking the position that no such industry standard exists and they did not know about it.

THE COURT: Well, they knew about it, so that much you have proved. But to the degree that it's enforced, it's somewhat doubtful in light of the testimony of this witness.

MR. J. ABADY: Well, the first document that we introduced—Judge, there will be additional testimony from another witness later in the case about that specific document and how the negotiation took place and what role **[105]** the industry standard played in it.

THE COURT: I am letting you do it. I made my rulings. I think you ought to forget it and go to the issue of market value of these slides because all of this is a big tumult over nothing, where you may have failure of proof that the market standard exists or it's enforced and it creates a possible source of error.

Now, I am adhering to my rulings but I think I have to tell you that once he tells you or once he tells the jury, "oh, yeah, we had a loss in 1977, they didn't pay the figure that's the market standard," then the market standard loses a lot of its vitality.

MR. S. ABADY: Well, your Honor, another matter—housekeeping matter so that you will not be delayed and taking care of your other business, defense counsel has handed to Mr. Gasperini this morning a subpoena duces tecum, which requires that he bring basically all of his photographs to court.

THE COURT: All right. That's quashed.

MR. MONTBACH: Your Honor—

THE COURT: Yes. That's absurd. You had plenty of pretrial discovery in this case. You had all the opportunities in the world to have your expert look at his other photographs.

MR. MONTBACH: Two things, your Honor.

[106] MR. S. ABADY: His expert did look at all of the photographs in my office.

MR. MONTBACH: Please Mr. Abady—

THE COURT: Please let him finish.

MR. MONTBACH: We subpoenaed—not today. We subpoenaed them through his attorney over two weeks ago when we were going to start this. Subpoena through his office.

THE COURT: How many photographs are involved?

MR. MONTBACH: He says 5,000.

THE COURT: I am not having 5,000 photographs—

MR. MONTBACH: He carries them.

THE COURT: —schlepped into this courtroom on a very simple case which two experienced lawyers are trying to make into a big deal. I am not having it.

Now, if there is a reasonable number of photographs which your expert looked at pretrial and wants to testify that this is a sample, it's no good, that you are free to do, but I am not having a subpoena for 5,000 photographs to be carried into this courtroom. That's absurd.

MR. MONTBACH: Your Honor, they can be carried in this box right here.

MR. S. ABADY: Eight of those boxes.

MR. MONTBACH: No. There were two of them when **[107]** you showed them to me in your office.

THE COURT: Where were the exhibits that the expert for the defendant saw?

MR. MONTBACH: Counsel's office.

THE COURT: Bring those in. They can look at what he looked at pretrial.

MR. MONTBACH: Also, the condition they were in when we looked at them.

MR. S. ABADY: We couldn't possibly do that.

MR. MONTBACH: We would like them in the condition we looked—

THE COURT: Lots of things I would like, I can't have them. They will be brought. You are not to intentionally mess them up.

MR. S. ABADY: Judge, let me speak to this issue. When his expert looked at these photographs, they were organized in stacks of plastic boxes which are used. They have since been mounted in mounted sleeves in three-ring binders, which is a second common way to bind them. We don't have the boxes anymore even though he subpoenaed them.

THE COURT: The ones that he was shown. The slides that he was shown must be produced.

MR. S. ABADY: Those are all of them.

MR. MONTBACH: We have subpoenaed the containers, [108] the bag they were in, to show how the plaintiff treated his own pictures.

MR. S. ABADY: They were in the normal manner.

THE COURT: One at a time. Look, both of you are treading on the time wasting threshold with me.

This is such a childishly simple case. If you can't settle it, I understand, but you certainly can try it. And I haven't heard a single word this morning which would help a juror put a price on these slides, not a word.

Now, sooner or later they are going to detect that this is going on and you will lose their interest.

MR. S. ABADY: I hear you, Judge.

MR. MONTBACH: Your Honor—

THE COURT: I am ordering that the slides which were produced pretrial shall be brought to court on Wednesday morning.

MR. MONTBACH: Your Honor, may I speak on this issue of how they were contained? Your Honor said last time we were here how the plaintiff treats his slides is indicative of the value he places on them.

THE COURT: It's some evidence.

MR. MONTBACH: I think we are entitled to show the jury that.

THE COURT: You can do that by direct testimony [109] or cross-examination.

MR. S. ABADY: We welcome it.

MR. MONTBACH: We would like them to bring the shoe boxes in here.

THE COURT: We are having brought in everything that the defendant expert saw pretrial and the subpoena is modified accordingly.

MR. S. ABADY: Judge, we don't have the other containers. We have new containers. It was done months ago.

THE COURT: Well, you bring what you have. Nobody can do the impossible. Your client may have to explain.

MR. S. ABADY: He will be glad to, your Honor. Number three on the duces tecum subpoena is all typewritten electronically stored records that relate to the transaction between plaintiff and defendant. All that has been produced. There are no additional records.

THE COURT: Bring it in.

MR. MONTBACH: Bring the originals.

MR. S. ABADY: We don't have electronically stored records.

THE COURT: Tell him you don't have it.

MR. S. ABADY: That's the point. We have already addressed number four, which has to—had to do with [110] packing materials which were in fact slide boxes, maxon* slide box.

MR. MONTBACH: The fruit boxes.

MR. S. ABADY: There were no fruit boxes.

THE COURT: Wait a minute. Both of you are treading on my patience. This is getting frivolous. You seem to want to saw the wind and reap the whirlwind from this jury.

I have not seen in a long time two people, each trying so hard to make something which is simple complex. Don't do it. You will get the dividends from them. If they decide you are obfuscating or exaggerating, they are going to take it out on your clients. And I run an honest roulette wheel. If you get a bad verdict, I am letting it stand. That's a warning to both of you.

MR. MONTBACH: I will show you where I wrote down the label on the fruit boxes.

THE COURT: That can be testimony. The fact they were in fruit boxes is some evidence. It's not probative.

MR. S. ABADY: They were in green plastic maxson* slide boxes, which you yourself have seen at the drug store. When they were brought into my office, they were put in the boxes. The slides were never loose in a fruit box as he suggests, ever.

THE COURT: That's a disputed issue of fact; **[111]** meaningless one but probably admissible.

I will see you all Wednesday morning.

(Case adjourned)

[151]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

93 Civ. 7204 CLB

WILLIAM GASPERINI,

Plaintiff,

v.

THE CENTER FOR HUMANITIES, INC
d/b/a GUIDANCE ASSOCIATES,

Defendant.

June 29, 1994 9:50 a.m.

Before:

HON. CHARLES L. BRIEANT,
District Judge.

APPEARANCES

RUBIN, KALNICK & BAILIN
Attorney for Plaintiff
SAMUEL A. ABADY
JONATHAN S. ABADY

BIGHAM ENGLAR JONES & HOUSTON
Attorney for Defendant
FRANCIS A. MONTBACH

MARTINDALE & BRZYTWA
Attorney for Defendant
KEVIN H. YOUNG

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[152] (Jury present)

THE COURT: Good morning, members of the jury. Will the witness please return to the stand.

ROBERT ZENTMAIER, resumed.

THE CLERK: Mr. Zentmaier, the court reminds you that you've previously been sworn.

THE COURT: Please resume.

MR. MONTBACH: May we approach the bench, your

THE COURT: All right.

(Discussion off the record)

THE COURT: Let's move along. No more side bar conferences.

DIRECT EXAMINATION (continued)

BY MR. J. ABADY:

Q. Mr. Zentmaier, I'm showing you what's been marked Plaintiff's Exhibit 12A in evidence. Do you recognize that?
A. Yes, I do.
Q. Can you say what that is?
A. It's the invoice for the loss of photographs from 1977.

MR. J. ABADY: Judge, at this time I'd move that into evidence.

MR. MONTBACH: I have no objection, your Honor.

THE COURT: Received without objection.

[153] (Plaintiff's Exhibit 12A for identification was received in evidence)

Q. And does that concern the loss in 1977 of seven transparencies—

THE COURT: It speaks for itself. It's in evidence.

Q. Showing you now what's been marked Plaintiff's Exhibit 12H for identification. I ask you if you recognize that.
A. Yes, it's a delivery memo for photos that we submitted to Guidance Associates in May of 1993.
Q. Is that your business record?
A. Yes, it is.

MR. J. ABADY: At this time I'd move that document into evidence.

MR. MONTBACH: Objection.

THE COURT: I think it's cumulative. We already had one of these.

MR. MONTBACH: It's in 1993, your Honor.

THE COURT: After the case started, sustained.

MR. J. ABADY: The difference between this and the previous exhibit is that this shows a particular transaction with the defendant corporation.

THE COURT: I understand. But it's after this lawsuit as I understand it.

[154] MR. J. ABADY: I still think that that's relevant to the issues in the lawsuit.

THE COURT: We'll discuss it at the next recess. For the present I'm sustaining the objection.

Q. Mr. Zentmaier, is it industry practice and practice of Photo Researchers to have people who are going to receive

and use slide transparencies sometimes pick up the transparencies from your premises?

MR. MONTBACH: Objection.

THE COURT: Is it to the form of the question?

MR. MONTBACH: The form, the relevance.

THE COURT: I think the relevance may be all right. Reframe the question.

Q. Mr. Zentmaier, to your knowledge have employees of the Center for Humanities been on your premises to pick up slide transparencies?

A. Yes, they have.

Q. And when they pick up slide transparencies on your premises are they required to sign something?

A. Yes, they are.

Q. And what are they required to sign?

A. A copy of the delivery memo.

Q. And on the delivery memo is the industry standard of $1500 printed on the form?

MR. MONTBACH Objection.

[155] THE COURT: I thought we already had this.

Q. What is the purpose of signing the delivery memo?

MR. MONTBACH: Objection.

THE COURT: I think I've taken this already. If I've not taken it already I'll let him answer. It's understood that there's no delivery memo in this case.

MR. J. ABADY: No, Judge. But I do think that there's a question—

THE COURT: I'll let him answer the question.

A. Would you rephrase the question or repeat it, please?

Q. The question is: What is the purpose of having someone sign the delivery memo on your premises prior to taking slide transparencies off the premises?

A. Well, it's to prove receipt and to bind them to the terms of the delivery.

Q. And one of the terms of the delivery is the industry standard of $1500, is that correct?

MR. MONTBACH: Objection.

THE COURT: Well, I think he's already told us that, hasn't he. I'll let him answer.

A. Yes, it is.

MR. J. ABADY: I have nothing further, Judge, with the exception of the issues I'd like to discuss at side bar.

[156] THE COURT: The only issue I know we have left open is 12H.

MR. J. ABADY: There's several other exhibits that I think relate to the same issue.

THE COURT: Before the witness goes we'll take a recess. If you wish to cross-examine him based on what's been done so far please do.

MR. MONTBACH: Yes, your Honor.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Zentmaier, when you were being questioned on Monday concerning your industry and the amount of money which your company charged for the use of various types of photograph slides, you mentioned the term "editorial use."

A. Yes.

Q. What does that mean?

A. Well, we define it as being textbook, encyclopedia, magazine, anything where a product is not being promoted. So if somebody is using it to advertise a piece of furniture and they have this in the background, that is an advertising use. If it's in a textbook, it's editorial use.

Q. In a magazine, a newspaper, a periodical?

A. If it's not part of an advertisement, it would be editorial.

[157] Q. And is the $160 figure which you gave as the fee which your company charges for editorial use uniform no matter what the subject matter of the picture is?

A. It doesn't vary with subject matter. It would vary with exposure. Let's say quarter page in a textbook for a color photograph. If it's larger it would be somewhat more expensive.

Q. Does it vary with the subject matter of the picture?

A. No, it doesn't.

Q. It doesn't vary with the difficulty of the shoot for the photographer?

A. Not in the editorial sphere.

Q. In the advertising it might, is that correct?

A. It might, that's right.

Q. How much of that fee, the $160 fee or whatever fee you charge, goes to the photographer, him or herself?

A. It is normally a 50-50 split, so $160, photographer would get 80.

Q. And the other $80 goes to your corporation?

A. That's correct.

Q. So if the photographer was dealing with the entity himself, your fee schedule wouldn't apply at all as far as you know?

A. It would be up to the photographer to establish, [158] yes.

Q. Now, how many slide transparencies does your agency, your company have in storage?

A. Approximately a million.

Q. Not more than a million?

A. You know, we're constantly editing it down and bringing in new material. It varies. It wouldn't be substantially over a million, no.

Q. And is that the normal amount of slides kept by the agencies of your size, you spoke of before, I think you said there's about 80 agencies in the business.

MR. S. ABADY: Objection.

THE COURT: It's cross-examination.

A. You mean our size in billing or our size in number of photographs? In number of photographs, of course. In billing it varies. If it's an agency that deals in the advertising market only, as many of them do—

Q. I'm not talking about billing, I'm talking about the number of slides kept in your inventory, agencies of your type, do they maintain inventories of approximately a million images?

A. It depends how tightly they edit. Some of them would have many millions.

Q. You stated that your company—

THE COURT: Don't restate it. We heard. Just [159] simple cross-examination.

Q. Your company does not catalog its slides by photographer, is that correct?

THE COURT: That's what he told you. You think he's going to tell you differently today?

MR. MONTBACH: No, your Honor.

THE COURT: I don't either. Ask another question.

Q. If someone calls for a subject such as Central Amer[illegible] in the 80s they would get a cross-section of photographers when you pick it out, is that correct?

A. That's correct.

Q. How do you store your slides?

A. They're stored in individual plastic sleeves called Keymax, then the Keymax are stored in visosheets that store 24 images each. That hangs in a filing cabinet, it holds 124 transparencies, you can hold it up to a light box so you can see the whole sheet.

Q. Kept in filing cabinet?

A. Yes.

Q. Wood or metal?

A. Metal.

Q. Do you store any of your slides in cardboard boxes?

A. No. None that are in our current files.
[160] Q. You don't keep them in shoe boxes?
A. No, we don't.

THE COURT: I have to take a telephone call. Please take a brief recess. You can step down during the recess.

(Pause)

(Jury not present)

THE COURT: On this Exhibit 12H, it seems to me that this document after this lawsuit is hardly probative of anything. It's also an agreement between someone other than the plaintiff and the defendant and also the prior record is sufficient to show about all that can be proved on this issue of custom and practice. The testimony so far at trial seems to show that the clause is not truly enforced even among those parties who have signed a receipt.

MR. S. ABADY: Your Honor, two things. As to the exhibits we intend to introduce—

THE COURT: Besides 12H, what are we talking about?

MR. S. ABADY: All of the subparts of 12 which are examples over a period of time that refutes this defendant's abject denial of any awareness of the industry standard.

THE COURT: Anything that this defendant did before the lawsuit I suppose is permissible.

[161] MR. S. ABADY: It shows not only that, as to the second point, your Honor, I would ask you to just hold your judgment in reserve until you hear all of our evidence which can explain the particular transaction and why that one was negotiated. We have evidence as to that—

THE COURT: You're going to wind up in a situation where the jury will not be inclined to give any weight at all to this line of proof.

MR. S. ABADY: Your Honor, to put it very simply, throughout the entire industry users such as this defendant have known for almost two decades that there is a $1500 minimum industry standard.

THE COURT: But it's not paid. If they don't pay it how is it a standard.

MR. S. ABADY: I'll answer that in a moment. Users know how the standard was developed, it's written about all the time in the professional journals and the magazines.

THE COURT: They do everything with a standard except pay it.

MR. S. ABADY: Your Honor, a standard is an expectation and a legal reason why they are bound. And it's an expectation within the industry. That someone violates a standard doesn't make it not a standard.

THE COURT: Quite the contrary. The fact that [162] people perform it generally is what makes it a standard.

MR. S. ABADY: Most people who are honest in their commercial dealings do perform it generally.

THE COURT: No such evidence.

MR. S. ABADY: And there are particular circumstances that explain the deviations in particular

THE COURT: It's a jury question. I wish you would forget about it and talk about the real issue in the case, which is what are the slides worth. I'm sustaining the objection to 12H. If you'll give me the rest of them I'll make a ruling on the rest of them so I'm not interrupted.

MR. S. ABADY: I apologize for interrupting, Judge.

THE COURT: Just hand them to the clerk. The court will take those that were prior to the lawsuit.

MR. MONTBACH: Prior to the lawsuit or prior to the loss?

THE COURT: Well, I think prior to the lawsuit.

MR. MONTBACH: I think something that happened prior to the loss, your Honor.

THE COURT: It shows custom and practice and it certainly can't be claimed that anyone altered their practice because of the pending lawsuit.

[163] MR. MONTBACH: I would object to anything prior to the lawsuit, your Honor.

THE COURT: Objection overruled.

MR. S. ABADY: I'm handing up 12C, 12F, 12G—I'm sorry, 12E, F and G.

MR. J. ABADY: And the court has 12H.

THE COURT: Are they all prior in time to the lawsuit?

MR. S. ABADY: Yes, your Honor.

THE COURT: They're received in evidence. Objection is overruled.

(Plaintiff's Exhibits 12E, F and G for identification were received in evidence)

THE COURT: Bring in the jury, please.

(Jury present)

THE COURT: Please resume.

Q. Mr. Zentmaier, you testified that—

THE COURT: Whatever he testified we heard. I can't have that. That's repetitious.

MR. MONTBACH: Sorry, your Honor.

Q. Mr. Zentmaier, the cabinets that you store slides in, images, I'll use your term, images in, is metal, right?

THE COURT: That's been asked and answered.

Q. Are they fireproof cabinets?
A. They're fire resistant.

[164] Q. How do you catalog your images?
A. We file them by subject, if that's what you mean.
Q. Do you keep a separate list of the subjects?
A. Yes, we do have such a list.
Q. And do you have in your inventory photographs, images from Central America, Nicaragua, El Salvador, during the 1980s?
A. Yes, we would.
Q. Sir, are you being compensated for being here today?
A. No, I'm not.

MR. MONTBACH: No further questions.

THE COURT: Any redirect for the witness?

MR. J. ABADY: Very briefly, Judge.

REDIRECT EXAMINATION

BY MR. J. ABADY:

Q. I place before you Plaintiff's Exhibit 12G. Can you tell the jury what that is, Mr. Zentmaier?
A. It's a copy of a delivery memo for photos submitted to Guidance Associates in October of 1993.
Q. And did someone sign for that delivery memo from Guidance Associates?
A. Yes, there's apparently an employee of Guidance Associates on the premises who did the selection of these images and she signed for them and she received them.
[165] Q. And could you tell the jury her name?
A. Gretchen Jones.
Q. I'd like to show you now what's been marked 12E or what's in evidence, I'm sorry, as 12E, and ask you to take a look at that and tell the jury what that document is.
A. This is a copy of an invoice that was sent to Guidance Associates in May of 1993 for the use of a photograph on the cover of a catalog.
Q. And was a one-time use purchased for that image?
A. Yes.

Q. And what was the price that was charged?

MR. MONTBACH: Objection.

THE COURT: It speaks for itself. It's in evidence, isn't it?

MR. J. ABADY: Yes, Judge.

THE COURT: Don't waste time. It's in evidence, the jury can look at it.

A. It was $700.

Q. Showing you now what is 12F in evidence. I ask you to tell the jury what that is.

A. It's an invoice to Guidance Associates dated October 20, 1993, for the use of a photograph on the cover of a catalog.

Q. And was a purchase made for one-time use of that slide?

[166] A. That is correct.

Q. And on the invoice like the delivery memo is the industry standard also printed?

A. Yes, it is.

MR. MONTBACH: Objection, your Honor.

THE COURT: It speaks for itself. It's in evidence.

MR. J. ABADY: Thank you, Mr. Zentmaier.

THE COURT: Anything else for the witness?

MR. J. ABADY: Just two more questions, Judge.

Q. Mr. Zentmaier, if you send a slide out for editorial use and you charge $160 for a first-time use for that editorial slide, and that slide is lost, what is the replacement cost?

MR. MONTBACH: Objection.

THE COURT: If he knows.

A. We would request $1500.

Q. Is the industry standard, the minimum industry standard of $1500 different for slides depending on whether they're editorial or advertising?

A. The slides are often the same slides. It's how they're used that varies. So there would be no difference in that regard.

MR. J. ABADY: No further questions.

THE COURT: Anything else for this witness?

[167] MR. MONTBACH: Very briefly, your Honor.

RECROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Zentmaier, you were shown two exhibits, 12E and 12F. Would you look at those?

A. The invoices.

Q. Yes. Were either of those invoices for photographs taken by Mr. Gasperini?

A. No, they were not.

MR. S. ABADY: Objection, your Honor, that's not disputed.

THE COURT: It speaks for itself.

MR. MONTBACH: No further questions.

THE COURT: All right. Why don't you leave before one of them changes his mind.

(Witness excused)

THE COURT: Next witness, please.

MR. S. ABADY: Your Honor, at this time plaintiff would recall the defendant William Goodman.

THE COURT: Mr. Goodman, you're reminded you've previously been sworn. Your testimony was interrupted in order to help move the trial along.

(Continued on next page)

[168] WILLIAM GOODMAN, resumed.

DIRECT EXAMINATION (Continued)

BY MR. S. ABADY:

Q. Mr. Goodman, I'm going to show you a document which has been previously marked as Plaintiff's Exhibit 11. That's a sworn statement you gave to an investigator about this loss, isn't that correct?

A. Yes.

Q. Mr. Goodman, look at Exhibit 11. It consists of four pages, isn't that correct, the handwritten version?

A. Yes.

Q. And the typed script is also the same four pages.

A. Right.

Q. And it begins at the beginning and end of each page identically with the handwritten script, isn't that correct?

A. Right.

Q. That's your signature at the bottom of each page, isn't that correct?

A. Yes, it is.

Q. You made that statement on April 30, 1993, isn't that correct?

A. Yes.

Q. And you made that statement knowing that if you made any false statement in this document, that it would be [169] a crime, isn't that correct?

A. I don't recall that.

Q. Well, look at the bottom, look at the language printed next to your signature on each page. Read it to yourself and then answer the question again.

A. Yes. You're correct.

Q. Did you tell the truth when you signed this statement?

A. Yes.

Q. On the top of the second page—

THE COURT: Is this document in evidence?

MR. S. ABADY: I'm going to move it in evidence, your Honor.

THE COURT: When you do it speaks for itself and that's the end of it.

MR. S. ABADY: Then if I—

THE COURT: You can either offer it in evidence and read any part of it you think is important and opposing counsel can read from it later but we're not going to have it come in indirectly.

MR. MONTBACH: We've already stipulated the loss occurred. This has to do with the occurrence of the loss.

THE COURT: Let me see the document.

MR. S. ABADY: There are other relevant issues involved.

[170] THE COURT: Don't discuss it in front of the jury. Go on to something else and I'll give you a ruling after I've looked at it.

MR. S. ABADY: Your Honor, the next line of questioning involves the document that I had presented to the witness last time before he was interrupted to take the testimony of Ms. Green. And in order to juxtapose the two—

THE COURT: Which exhibit is that?

MR. S. ABADY: That would be Plaintiff's Exhibit 3. I cannot juxtapose the difference in the two texts unless you let me adduce from the witness answers as to what he's written on one and compare it to what he's written to the other.

THE COURT: Is Exhibit 3 in evidence?

MR. S. ABADY: Not yet.

THE COURT: Lay the foundation for Exhibit 3 and offer it in evidence.

MR. S. ABADY: I had done that once, your Honor, but I will do it again.

THE COURT: I sustained an objection to Exhibit 3. And that's the ruling according to the clerk's records here.

MR. S. ABADY: But you did say that I could cross him on the relevant information and the information that is [171] relevant—

THE COURT: Ask him the underlying factual issue, hand Exhibit 3 to the clerk, and if his testimony differs from what he set forth in Exhibit 3, then you can call it to his attention.

MR. S. ABADY: Your Honor, the point I'm trying to show is that there's a difference in testimony given in the two documents or statements made within the two documents.

THE COURT: Focus on the underlying fact and then ask him as to what the truth is as to that fact. The court is probably going to sustain the objection to Exhibit 11.

MR. S. ABADY: I'd like to make a record on that if that's so, your Honor.

THE COURT: You can make a record, just make it. Just do something.

MR. S. ABADY: Sorry, Judge.

Q. You previously testified, Mr. Goodman, as to this loss. Isn't it true, sir, that prior to your testimony on Monday that in a sworn statement which you've acknowledged as Plaintiff's Exhibit 11 you attributed this loss not to your company but rather to Susan Green? Yes or no?

A. No, I did not. I did not, I never attributed the loss to Susan Green.

Q. Isn't it true that you identified her as someone [172] who was not employed by you?

A. No.

Q. Well, then look at page 2 of Exhibit 11.

THE COURT: Since the loss is conceded and it's his fault or the fault of the defendant, that's all you need to know. And I'm stopping this questioning and I'm limiting you to the

proof of the value of the property at the time of the loss. No more of this.

Members of the jury, it doesn't matter whether it's Ms. Green's fault or his fault.

MR. S. ABADY: Your Honor, it has to do with credibility issues, Judge.

THE COURT: That's my ruling. How can there be: Any credibility? He hasn't testified to anything that's relevant. The slides are lost.

MR. S. ABADY: If he's made—

THE COURT: The slides are lost. This jury is charged with one thing and one thing only, to fix the monetary value of the loss. If you'll just go directly to that and stop the nonsense, please.

MR. S. ABADY: Your Honor, if—

THE COURT: No, no more discussion. Do something constructive.

MR. S. ABADY: Yes, Judge.

Q. Mr. Goodman, do you have a copy of the subpoena [173] that I served on you?

A. Yes. It's in my briefcase.

Q. Could I have it, please?

(Handed to counsel)

MR. S. ABADY: I'm going to mark as an additional exhibit, your Honor, the next number which would be number 29, this subpoena. And I'd offer it in evidence.

MR. MONTBACH: No objection.

(Plaintiff's Exhibit 29 for identification was received in evidence)

Q. Mr. Goodman, I show you page 4 of the subpoena, paragraph 5, the last paragraph of the documents that you were to deliver to me in court. Do you see that?

A. Yes.

Q. And you were to search your records and to deliver to me delivery memos, is that correct?

A. Correct.

Q. You've heard testimony in this action, you know what a delivery memo is.

A. Right.

Q. Now I'm going to mark and show you the documents that were handed to me this morning by your counsel.

MR. S. ABADY: That will be Plaintiff's Exhibit 30, your Honor. And I would move those in evidence.

Q. Do you recognize, Mr. Goodman, that group of [174] documents handed to me by Mr. Montbach this morning as part of your document production?

A. Yes, I do.

MR. S. ABADY: I assume there's no objection, your Honor.

MR. MONTBACH: No objection.

(Plaintiff's Exhibit 30 for identification was received in evidence)

Q. Mr. Goodman, isn't it true that on numerous of these exhibits you have copied for me only the front and not the printed language on the back of the delivery memos?

A. Yes.

Q. And isn't it true that the language which you failed to deliver in response to that subpoena on the back of these delivery memos, on each and every one of them, there was printed that the minimum industry standard for a lost or damaged slide was $1500?

MR. MONTBACH: Objection.

THE COURT: I'll let him answer.

A. I don't know.

Q. Did you examine the documents before you produced them?

A. Some of them. But I didn't look at the back of them before they were xeroxed.

Q. Are you familiar with the content of the [175] documents?

A. I looked at one.

Q. Which one did you look at?

A. I looked at the first one that's on the sheet.

Q. And that would be from FPG, is that correct?

A. Yes.

Q. I'll show you what has been previously marked as Plaintiff's Exhibit 13F.

MR. S. ABADY: For the record, your Honor, that should be 13G. No, it is 13F. I apologize for the confusion and delay.

Q. That's a document entitled invoice, isn't that correct, what you produced to me, an FPG invoice?

A. Right.

Q. I'll show you what's been marked as Plaintiff's Exhibit 13F, that's also an FPG invoice, isn't that correct?

A. Yes.

Q. And printed on the back of that document the language you neglected to produce to me from your records is the minimum industry standard of $1500 per slide, isn't that correct?

MR. MONTBACH: Objection.

THE COURT: If he understands the question he can answer it.

A. The number $1500 is on this document.

[176] Q. It's just there by itself, hanging out there without explanation?

A. There are a bunch of words around it.

Q. That would be paragraph 10, would it not?

A. Yes.

Q. Doesn't paragraph 10 say "We both agree it is difficult to determine in advance the monetary damage FPG and the photographer will suffer—"

MR. MONTBACH: Objection, your Honor.

THE COURT: Is the document in evidence?

MR. MONTBACH: No.

THE COURT: It can't be read from.

MR. S. ABADY: I'll offer it in evidence.

THE COURT: What's the date of it?

MR. S. ABADY: It's the same form.

THE COURT: The form is in evidence. I'll sustain the objection to reading from it at this time. The form can be read from.

Q. The bunch of words as you say surrounding the $1500 is in paragraph 10 involving, which explains what you must pay if you lose an original slide transparency, is that correct?

MR. MONTBACH: Objection.

THE COURT: Sustained.

A. Is that a legal—

[177] THE COURT: Wait for the next question. The objection is was sustained.

Q. Also in Plaintiff's Exhibit 30, the documents you produced this morning, is a delivery memo from Photo Researchers Inc., Mr. Zentmaier's company, is that correct?

A. Yes.

Q. And that's to your company, isn't that correct?

A. Yes.

Q. It's your business record?

A. Yes.

Q. You also neglected to copy the back of that document and give it to me, isn't that correct?

A. Yes.

Q. You were here in court this morning and on Monday when Mr. Abady cross-examined, this Mr. Abady cross-exam-

ined Mr. Zentmaier or examined Mr. Zentmaier and presented him the various documents in Exhibit 12 which were admitted in evidence from Photo Researchers?

A. Yes.

Q. And you heard him testify that the language on the back of his form was the same $1500 industry standard, correct?

A. Yes.

Q. You heard that testimony?

A. Yes.

[178] Q. Is there a reason why you didn't make me a copy of that from your records?

A. No, no reason.

Q. But your company is aware of the industry standard, these are from your records, isn't that correct, sir?

MR. MONTBACH: Objection.

THE COURT: Compound question.

Q. Your company is aware of the industry standard, isn't that correct, sir?

MR. MONTBACH: Objection.

THE COURT: Overruled.

Q. Isn't it true that you're aware of the industry standard, your company, Guidance Associates, the Center for Humanities?

A. Yes.

Q. Now, I have the yellow Post-it attached to a delivery memo from a stock agency called Famous Food Plus as part of Plaintiff's Exhibit 30. That has the $1500 minimum industry standard for a lost or damaged slide printed on front of that form, isn't that correct?

A. Yes. But it never says industry standard. Is that word there, I didn't see that.

Q. Does it say that each transparency will cost you $1500 if you lose it?

[179] MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. That same language appears on this document from FPG entitled delivery contract, isn't that correct, sir?

MR. MONTBACH: Objection, what same language?

THE COURT: Sustained.

Q. On the delivery contract from FPG for which I've also placed a yellow Post-it note at the bottom in paragraph 3 does it not say that you're liable for $1500 if you damage or lose each or any slide?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. I'll show you, sir, what's been previously marked as Plaintiff's Exhibit 13G which is an FPG form entitled delivery contract.

MR. S. ABADY: And I offer it in evidence, your Honor.

THE COURT: Before the lawsuit?.

MR. S. ABADY: Yes.

THE COURT: Received in evidence.

MR. MONTBACH: Excuse me, what document are we doing?

MR. S. ABADY: 13G.

MR. MONTBACH: It's a form, right?

MR. S. ABADY: It's a form.

[180] MR. MONTBACH: So it's—

MR. S. ABADY: It's the same form—

THE COURT: Used by this defendant.

MR. MONTBACH: Used by FPG.

(Plaintiff's Exhibit 13G for identification was received in evidence)

Q. 13G is the same form on which your FPG delivery contract pertaining—

MR. MONTBACH: Objection to the banging.

THE COURT: Yes, the banging is kind of silly and a waste of time. Don't keep doing it.

Q. Isn't that correct, Mr. Goodman?

A. The front pages look the same.

Q. I would ask in the presence of the jury that you examine them and make sure that they're the same.

It's the same form, isn't it, Mr. Goodman?

MR. MONTBACH: Allow him to examine it.

THE COURT: The same form as what?

MR. S. ABADY: As what was produced from the business records of the defendant, your Honor, demonstrating its awareness.

A. It looks like the same form to me.

Q. I'll show you what's been previously marked in evidence as Plaintiff's Exhibit 13A, which is the delivery memo form used by Photo Researchers, Mr. Zentmaier's [181] company. That's the same form as your copy of Photo Researchers delivery memo that you produced, is it not, sir?

A. It looks to be the same.

Q. And the language on the back at paragraph 4 was not included in the copy that you gave me, isn't that correct, sir?

A. Correct.

Q. You didn't photocopy that to provide to me from your business records?

A. No.

Q. Now, your company does a lot of business with a photo stock agency in New York called Magnum Photos, isn't that correct?

A. I'm not aware of that.

Q. You're not aware of that? I'll show you what's been previously marked as Plaintiff's Exhibit 28A. This is a copy of a check from your company to Magnum Photos at 72

Spring Street in the amount of $74.75 for the reproduction of a single slide, isn't that correct?

A. I don't see where it says single slide. I see the amount.

Q. You see the amount?

A. Yes.

Q. You see what's at the top, sir? You see where it has an invoice and a number?

[182] A. Yes.

Q. There's only one number that appears there, isn't that correct?

A. Yes.

Q. And each number stands for a slide so you would presume from that there was one slide, isn't that correct?

MR. MONTBACH: Objection, is counsel testifying?

THE COURT: I don't know what he's doing.

A. I don't know.

THE COURT: Is there an exhibit in evidence?

MR. MONTBACH: No.

MR. S. ABADY: I move it into evidence, your Honor.

THE COURT: Show it to counsel.

MR. MONTBACH: He has a copy.

MR. S. ABADY: I assume there's no objection.

MR. MONTBACH: There is an objection. I don't know what the relevance of this is.

THE COURT: Is it before the lawsuit?

MR. MONTBACH: It's before the lawsuit with another company for a royalty payment.

MR. S. ABADY: In response to Mr. Goodman's answer that he did not know that his company did business with Magnum Photos.

THE COURT: I thought he did say they did **[183]** business. He didn't know if they did a lot of business.

MR. S. ABADY: I believe he said he didn't know if they did business.

THE COURT: Received in evidence just for the purpose of whether they did business.

(Plaintiff's Exhibit 28A for identification was received in evidence)

Q. And I show you, Mr. Goodman, what has been previously marked as 28B. I hand your counsel a copy. And the first page of 28B is an invoice to you from Magnum Photos, second page is a check signed by Anita Bacard to Magnum Photos, the third page is an account statement, isn't that correct, sir?

A. Yes.

Q. And on the second page of Exhibit 28B, minimum industry standard for a lost or damaged slide of $1500 clearly appears, does it not?

MR. MONTBACH: Objection. We will stipulate —

THE COURT: It speaks for itself.

MR. MONTBACH: We'll stipulate there's a figure on this document of $1500.

MR. S. ABADY: Fine, I move it into evidence, your Honor.

THE COURT: If it's in evidence, it speaks for itself. Is it something that took place with him?

[184] MR. S. ABADY: Yes, your Honor.

THE COURT: Prior to the lawsuit?

MR. S. ABADY: Yes, your Honor.

THE COURT: It will be received in evidence.

MR. MONTBACH: The company, yes, your Honor. It's something with the company.

THE COURT: He and the company are one and the same as far as the jury is concerned. No distinction needs to be made.

(Plaintiff's Exhibit 28B for identification was received in evidence)

Q. Mr. Goodman, I show you what's been previously marked as Plaintiff's Exhibit 28C, a spread sheet of all of your purchases from Magnum Photos in the month of February 28th of 1991. Isn't it true, sir, that for reproduction rights of slide transparancies, just the reproduction rights, you did over $21,000 in one month with that agency?

A. No. This isn't a one-month statement.

Q. Looking at the statement, Mr. Goodman, how can you tell that it's not a one-month statement? At the top doesn't it say for the period ended 2/21/91?

A. Yes, it does.

Q. Wasn't the computer run done on the date of March 1, 1991, and isn't that the next day after February 28th?

A. Yes, but that doesn't mean this is a one-month **[185]** statement.

THE COURT: I have to take a recess to take a phone call. Please go to the jury room, members of the jury. You can step down, Mr. Goodman.

(Recess)

(Jury not present)

THE COURT: I think that all that can be developed here has been developed and I really would earnestly commend to you that you leave this and start proving the value of the slides.

MR. S. ABADY: Your Honor, I've adduced this because I think it goes directly to the issue of valuation.

THE COURT: You've got all the evidence you're going to get on this custom and practice and it has very little value to you because the memorandum receipt was not signed in this case and this company on the occasions in the past has not paid the full agreed amount. So nothing more asked of this witness will change that.

MR. S. ABADY: Your Honor, if you look at our brief—rather than belabor the point now, because I know you want to move the case along—

THE COURT: I want to prove the value of the slides.

MR. S. ABADY: Any user's awareness of the industry standard is relevant to the proof.

[186] THE COURT: It's an industry standard when people in the industry perform it or obey the standard in their day-to-day conduct. This witness has not conformed.

MR. S. ABADY: It's an industry standard if everyone in the industry is aware.

THE COURT: They're aware but they don't obey it so it ceases to be a standard. And you'll make your record worse instead of better if you keep plugging away at this. Please bring in the jury.

MR. S. ABADY: So as to move quickly, your Honor, we were up to 13D, I believe.

(Jury present)

Q. Directing your attention to Plaintiff's Exhibit 28C, Mr. Goodman, you've paid Magnum Photos $21,599.50, isn't that correct?

A. That's correct.

Q. And you paid them that price for the reproduction rights of the various photos listed on this spread sheet, isn't that correct?

A. Yes.

MR. S. ABADY: I'd offer the document in evidence, your Honor. I assume there's no objection.

MR. MONTBACH: Objection.

THE COURT: It's offered just to show his course of dealing with this other outfit?

[187] MR. S. ABADY: Yes, your Honor.

THE COURT: I'll take it solely for that purpose.

(Plaintiff's Exhibit 28C for identification was received in evidence)

Q. Mr. Goodman, many of the delivery memos that you produced in response to my subpoena is from a stock agency called Super Stock, is that correct?

A. Yes.

Q. The majority of them. The $1500 industry standard appears in the back of each of those forms too, does it not?

A. I don't know that.

Q. But again, the backs of those forms were not copied and provided, isn't that correct, sir?

A. Right.

Q. Mr. Goodman, Bill Gasperini's slides that were part of the three-part video series that you produced, which is Plaintiff's Exhibit 10, contained a number of shots taken from scenes of civil war in Central America, isn't that correct?

A. Yes.

Q. And that was your prime motivation for selecting Mr. Gasperini's photos, was it not, sir?

A. For use in the program?

Q. Yes, sir.

[188] A. Yes, that's correct.

Q. And you were quite pleased with the professional quality of Mr. Gasperini's work, were you not?

A. Yes, I was.

Q. Now, when was the program complete, Mr. Goodman?

A. I believe sometime during the summer of 1991.

Q. That would be July of 1991?

A. I believe so. That's to the best of my recollection.

Q. And you first realized the slides were lost about a month afterwards or August of 1991, isn't that correct, sir?

A. Yes, that's correct.

That's the earliest date that you can fix the loss being realized, isn't that correct?

A. Yes.

Q. August of 1991. Now, Mrs. Charlotte Gasperini tried to get in touch with you to retrieve her son's slides, isn't that correct?

A. Yes.

Q. And when she was unsuccessful Bill Gasperini called you to discuss the loss of his slides, isn't that correct?

A. Yes, that's correct.

Q. And when you informed him—and he was out of **[189]** the country when he called you, isn't that correct?

A. Some of the times I believe he was, yes.

Q. He called you from Moscow, did he not?

A. One time, yes.

Q. During that telephone call from Moscow when you informed him for the first time that his slides were lost—

MR. MONTBACH: Objection, counsel is testifying.

THE COURT: It's compound already.

Q. I'll rephrase the question. During that telephone call from Moscow, Mr. Gasperini was very upset, was he not?

A. Yes.

Q. Upon learning that his slides were lost.

A. Yes.

Q. And during that conversation he told you they were valuable, didn't he?

A. Yes.

Q. And you told him he knew they were valuable?

A. Yes.

Q. And you told him because of that, that's why you had conducted such an extensive search, isn't that correct?

A. Yes.

Q. And that not only did you instruct your staff to do so but you yourself searched for the slides?

A. Yes, I did.

[190] Q. And that you enlisted the support of almost everyone in your agency.

A. Yes.

Q. In your firm.

A. That's correct.

Q. About 40 people at the time.

A. Right.

Q. And you told everybody there to look everywhere, everywhere they could think of to find these slides, isn't that correct?

A. I didn't say everywhere they could think of.

There were a few places where we thought they might be and had people who worked in those areas primarily to spend sometime looking for them in those areas.

Q. Well, you recall testifying at a pretrial deposition on February 14th?

A. Right, yes.

THE COURT: What page?

MR. S. ABADY: Page 55.

Q. You remember we were in that large—

THE COURT: Just read the line and the question and answer, give the line and page.

Q. You recall being there?

A. No. Please repeat the question?

Q. At 14 Wall Street, the firm of Bigham, Englar, [191] Rosen, do you recall being there?

MR. MONTBACH: Objection, your Honor.

THE COURT: Waste of time.

MR. MONTBACH: Get my firm's name right, please.

THE COURT: Read the question.

MR. S. ABADY: Jones and Houston. There's no Rosen in your firm, forgive me.

Q. Page 55. Mr. Goodman, do you remember being asked the question, referring to your staff:

"Q. Did you ask them to look in furniture and shelves and files?

"A. Look everywhere. That's what I said."

MR. MONTBACH: Objection to the characterizing.

THE COURT: I'll sustain the objection. It's not inconsistent with his current testimony at trial. Not inconsistent. He looked. He didn't find them. That's why we're here today.

MR. S. ABADY: I understand that, your Honor.

Q. Mr. Goodman, you also knew at the time you realized the loss that you would have to compensate Mr. Gasperini for this loss, isn't that true?

A. Yes, I did.

Q. And that you owed him something, isn't that correct, sir?

A. Yes, I did.

[192] Q. And you spoke about the loss many times with your chief financial officer.

A. I spoke with him a number of times. I couldn't quantify it.

Q. Now, you paid Mr. Gasperini two separate payments, isn't that correct, sir?

A. Can you be more specific.

Q. You paid him royalty payments and you paid him an editorial payment, isn't that correct?

A. That's correct.

Q. I show you what's been previously marked as Exhibit 5.

MR. S. ABADY: Let the record reflect I'm providing counsel a copy.

Q. Could you tell the ladies and gentlemen of the jury what Plaintiff's Exhibit 5 is, Mr. Goodman?

A. It's a royalty payment. It's a statement of royalties paid.

MR. S. ABADY: I'd offer that in evidence, your Honor.

THE COURT: Received in evidence without objection.

(Plaintiff's Exhibit 5 for identification was received in evidence)

MR. S. ABADY: Let the record reflect I'm [193] providing counsel with a copy of Plaintiff's Exhibit 6.

Q. These are check stubs and envelopes from Guidance Associates, the Center for Humanities, is that correct, sir?

A. Yes, they are.

Q. And they reflect your payment of royalties for the one-time reproduction of Mr. Gasperini's slides?

A. I don't know if one-time reproduction is the definition of what they represent.

Q. They represent your use one time to put his slides into Plaintiff's Exhibit 10, the video series Conflict in Central America.

A. For use in that program, yes.

MR. S. ABADY: Offered in evidence, your Honor.

MR. MONTBACH: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 6 for identification was received in evidence)

Q. Let the record reflect that I've handed counsel Plaintiff's Exhibit 7. I show you a copy of Plaintiff's Exhibit 7, Mr. Goodman. That's a one-time payment of $3500 in the top check stub that you paid Mr. Gasperini for his editorial work on the video, isn't that correct?

A. Yes, that's correct.

Q. And the check stub on the bottom is a royalty check, isn't that correct?

[194] A. That's correct.

MR. S. ABADY: Offered in evidence, your Honor. I assume without objection.

MR. MONTBACH: You've got two pages. Do you want to describe the second page?

MR. S. ABADY: Forgive me. I appreciate your reminding me of that.

Q. And the second page is two more check stubs for interim royalty payments?

A. Yes.

MR. MONTBACH: No objection.

THE COURT: Received in evidence.

(Plaintiff's Exhibit 7 for identification was received in evidence)

MR. S. ABADY: Let the record reflect I'm handing counsel Plaintiff's Exhibit 8.

Q. Mr. Goodman, examine Plaintiff's Exhibit 8. That's a copy of the teacher's guide that Mr. Gasperini authored to accompany the video, isn't that correct?

A. Yes.

Q. And you would have that printed up and distributed with the video series?

A. Yes.

Q. And the $3500 payment was for his work in writing the teacher's guide?

[195] A. Not solely.

Q. But included in that?

A. Yes, that's correct.

MR. S. ABADY: I offer that in evidence, your Honor. I assume without objection.

THE COURT: Received without objection.

(Plaintiff's Exhibit 8 for identification was received in evidence)

MR. S. ABADY: Bear with me one minute, Judge, I think I can finish up quickly.

Q. Mr. Goodman, you heard your counsel in his opening statement—

THE COURT: No, just facts. Just ask him questions which elicit facts.

Q. Do you know what the term ex gratia means, Mr. Goodman?

A. Yes, I do.

Q. Have you heard that term used in this courtroom?

A. Not until now. Yes, I did hear it, at the beginning. That's right, Mr. Montbach used it in his opening statement.

Q. What does it mean, Mr. Goodman?

A. My understanding is it's a payment made basically in kind or in good faith —

THE COURT: In what?

[196] A. In kind or in good faith as opposed to contractual obligation.

Q. It means a gift, right?

A. Right.

Q. Something not required, it's a gift, right?

A. Yes.

Q. That's how he described the $3500 payment. In fact, Mr. Goodman, that $3500 payment was not a gift at all, isn't that correct, sir?

A. No.

Q. It was for services rendered by Mr. Gasperini.

A. Not exclusively.

Q. Do you recall, and I direct your attention, your Honor, to page 142 of the deposition, at the pretrial deposition being asked about this and do you recall being asked the question by me:

> "Q. Was it a gift or an exchange for his services?
> "A. It wasn't simply a gift, no. It was for services. Bill did render services."
> Do you recall making that testimony?

A. Yes. That means I said both, it's both a gift and for services.

Q. I see. So you want this jury to believe that you paid Mr. Gasperini a gift of $3500?

[197] Q. Can I explain what I mean by gift?

Q. Are you saying that $3500 check represented a gift to Mr. Gasperini?

A. No, I'm not.

Q. You just testified a moment ago it was for his editorial work?

A. I'm telling you that the reason I gave Mr. Gasperini the $3500 check is because Bill said to me, you know: "I did a lot of work on this program and I haven't made much money on the royalties" and I said: "I understand that, it hasn't sold as well as I thought it would and I would like to help compensate you for what's happened and the fact that it didn't work out better."

You can interpret it as you want but that was a show of good faith, help, friendship, plus he did a lot of work on the program.

Q. But it was for services, isn't that correct?

A. Sure.

Q. Is he a social friend of yours, Mr. Gasperini?

A. We met through a mutual friend.

Q. But he's not a social friend?

A. No.

Q. It's a professional relationship?

A. I wouldn't call it exclusively a professional relationship.

[198] Q. Did you ever go out with him socially anywhere?

THE COURT: Does this really matter to the critical issue to be decided here today? He would owe just as much money for these slides if he went out with him socially or if he didn't go out with him socially. Please concentrate on the issue which the jury is being called upon to decide here, how much money for the lost slides. That's all. That won't be any greater if he's a social friend or if he never socialized with him in his life.

MR. S. ABADY: Your Honor, I just—

THE COURT: Just stick on the main chance. Just get to the money. Anything else?

Q. Mr. Goodman, for clarity of the record —

THE COURT: No. Just simple questions.

Q. We're talking about 310 slides, isn't that correct, sir?

A. I believe so, yes.

THE COURT: Is there any cross-examination?

MR. MONTBACH: Very brief, your Honor.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Goodman, on Monday when you said, in response to counsel's question, that you did not consider these slides to be unique, why did you say that?

A. Because I was always under the understanding that [199] there were many slides on Central America available. Bill just happened to be the person that I knew who had been there and taken a large number of them.

Q. Is this why you responded to the question that he was the only person you knew who had pictures of Central America?

MR. S. ABADY: Objection as to his motivation.

THE COURT: Sustained.

Q. At the time you had your conversation with Mr. Gasperini, had you looked for slides of this type from other sources?

A. No, I had not.

Q. Have you done that since then?

A. No.

MR. MONTBACH: No further questions.

THE COURT: Please step down before they want to ask you something else.

MR. S. ABADY: No redirect.

(Witness excused)

THE COURT: Call the next witness.

MR. S. ABADY: I'll go get the witness, Judge.

Your Honor, the plaintiff calls Mrs. Charlotte Gasperini to the witness stand.

[200] CHARLOTTE GASPERINI, called as a witness by the plaintiff having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. Mrs. Gasperini, what is your relationship to my client?

A. He's my son.

Q. How old are you?

A. I'm 75.

Q. Where do you live?

A. I live in Chappaqua, New York.

Q. What's the proximity of your home to the defendant's offices? How far is your home from the defendant's offices?

A. It's about ten minutes at the most.

Q. Is your son away most of the part of each year?

A. That's right.

Q. Does he keep things at your house?

A. Yes, he does.

Q. Among the things that he kept at your house, did he keep his slides?

A. Yes.

Q. Taken throughout his career?

A. Right.

[201] Q. Describe to the ladies and gentlemen of the jury where you live.

A. I live in a carriage house apartment on an estate. There are four dwellings on the estate and this is, Haight's Cross-roads is the address.

Q. Are you a tenant in the carriage house?

A. I'm a tenant.

Q. You don't own the estate?

A. No. No, I rent the carriage house apartment.

Q. How large is the estate on which you live?

THE COURT: That has nothing to do with the value of the slides.

MR. S. ABADY: It does, your Honor.

THE COURT: How big the estate she lives on has nothing to do with the value of the slides. She has a home there. I'm not talking it. You are wasting my time. You concentrate on the value of the slides. That's all this jury has to find out, what those 310 slides are worth.

Q. Mrs. Gasperini, would you describe the security of the estate that you live on?

A. Yes. We have, the security as far as where the slides are?

Q. Yes. The slides and the home in general.

A. Right. My landlord has a security fire protection system which the alarms are in every dwelling. [202] Actually, I'm sort of centered where I am so that the telephone number, the telephone extension to where the fire place, it's called Guard-ware, it is connected to them and they call me if the alarm goes off. And all the alarms go off at the same time whenever there is a problem of fire protection which is to me, that's always been very important.

Q. Please continue.

A. Anything else? I can tell you about I have, it's a very, very strong dwelling, an old dwelling. And I'm very protected there myself.

Q. Is it fenced in?

A. Oh, yes.

Q. Around the perimeter?

A. The entire place.

Q. Is that several miles of fencing?

A. Yes. A gate on Haight's Crossroad. That's been one of the great things for me since my husband died that I could have that kind of protection.

Q. What was Bill's attitude towards his slides in terms of how they were to be cared for?

A. Bill is a very organized guy and the slides, whenever they came from, what do you call it, the publisher—

Q. The developer.

[203] A. The developer. Whenever they would come, they usually came in plastic taped boxes. And I would put them in large boxes which are very strong boxes and I would put them in the storeroom, which there's no entrance except an electronic door. And when he would come, he would take the slides and edit them, but as soon as they came through the mail.

Q. Did Bill ever throw his slides around loose in a cardboard box?

A. Never.

Q. Did he ever leave them loose in a shoe box?

A. Never.

Q. Did he ever leave his slides laying out loose or toss them around as if they were meaningless or valueless?

A. After he had edited them he would put them in binders and some of those were stored in a closet in my guest room. But otherwise, he never, never did that.

Q. Have you ever been burglarized or robbed at home?

A. No, Never.

Q. What has been your attitude about maintaining Bill's slides?

A. I've always felt that I was the guard to take care of them.

Q. Did there come a time when you attempted to contact William Goodman, seated there at defendant's table, **[204]** at the end of the summer of 1991 about Bill's slides?

A. I did several times.

Q. Describe for the jury your efforts?

A. Bill, he was I think at that time in Saudi Arabia, and every time he would call me he'd say did you ever get my slides from Will and I did call Will and at one point when I called to ask, meanwhile the video had been published, and I asked him if I could see the video and he sent the video to me at my position at the high school where I was working and I asked about the slides and he said that he was working on that.

Q. Did he ever tell you outright in the first telephone conversation that they were lost or couldn't be located?

MR. MONTBACH: Objection.

THE COURT: It's sort of a leading question, isn't it? The slides are lost. There's 310 slides that are lost. I keep trying to direct your attention to that fact.

MR. S. ABADY: I'll move on, your Honor.

THE COURT: This jury wants to know any information which will help them put a money value on them.

MR. S. ABADY: We're getting there, Judge. We have witnesses lined up all day.

THE COURT: When did you first learn they were lost?

[205] A. I don't think Will ever told me that they didn't know. I think he was looking for them in a warehouse because he hadn't found them previously.

Q. Moving on, Mrs. Gasperini, what was Bill's attitude when he would call about the slides?

A. Well, he was very concerned.

Q. Did you offer to retrieve them?

A. Yes, I did.

Q. Did you offer to Mr. Goodman to retrieve them?

A. Yes, I did.

Q. What was his response?

A. He said no. He said when I get them I'll get them to you.

MR. S. ABADY: No further questions, Judge.

THE COURT: Is there any cross-examination?

MR. MONTBACH: Yes, your Honor.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mrs. Gasperini, the boxes in which—strike that question, please. You stated that you received—

THE COURT: Whatever she said we heard. No repetition.

Q. You received the slides—

THE COURT: Come on, no repetition.

MR. MONTBACH: I'm not tryint to repeat. I'm **[206]** trying to set the stage.

Q. What type of boxes did you receive the individual slides in? You talked about coming from the developers.

A. Most of them, some of them were, they were different developers. Kodak. And many of them were Fuji, and they were strong, black, not black, they were green boxes.

Q. The Fuji ones?

A. Yes.

Q. Kodak was yellow?

A. Yes, you got it.

Q. Did you receive these boxes from places other than Kodak and Fuji?

A. I don't remember. There were others.

Q. You always received them straight from the developers?

A. No, no.

Q. You always received them straight from the developers?

A. Directly.

Q. Did your son ever bring them to you, ever bring you the boxes with the developed slides in them?

A. You mean Bill?

Q. Yes.

A. No, they came by mail because he was always out **[207]** of the country.

Q. Your daughter in California never gave you boxes of slides?

A. No because this period of time was when Bill was in Nicaragua and in Saudi Arabia, wherever he was it was during that period of time that I was living there and they were sent to me because the developers were, I think, in New York.

Q. And when you received these from the developers, you would place them into a fruit box?

A. I wouldn't call it a fruit box. For years I, they were called Mixon, and they were very strong cardboard boxes. I've used them—

Q. Boxes like you receive grapefruit in when it's mailed to you?

A. That's right.

Q. Do you have a box like that with you here today?

A. I don't have one.

THE COURT: We're not going to waste time with the box.

MR. S. ABADY: We have it.

THE COURT: Did they fall out of the box?

MR. MONTBACH: No, to my knowledge, no.

A. Very solid box.

THE COURT: Neither attorney wishes to **[208]** concentrate on the fact that there's 310 lost slides that have a value of some monetary amount that this jury has to fix. They want to talk about a box.

Q. Were the mailer boxes that you had placed inside of other boxes before they were put into the fruit box?

A. The mailer boxes —

Q. The small ones from Kodak or Fuji?

A. Yes. They were directly, and they were taped, and they went directly into those boxes as soon as they came until Bill needed them.

Q. Were any of them placed into a yellow shoe box?
A. No.
Q. Were any of them placed into paper bags?
A. Never.
Q. Was there a brown bag with the label Squire's on it inside one of the fruit boxes containing slides?
A. No.
Q. Squire's of South Greeley Avenue, Chappaqua, New York?
A. No.
Q. AGFA chrome slides?
A. No.
Q. Mailer boxes that were developed by a company named AGFA, AGFA chrome mailer boxes?
A. That's a name—
[209] Q. Silver boxes?
A. That's a name that I remember.
Q. Were ten of those boxes placed in a brown bag from Squire's?
A. I don't know. It was after I took care of them.
Q. Did there come a time when you were asked by your son to deliver any slides to Center for the Humanities?
A. No.

MR. MONTBACH: No further questions.

THE COURT: Anything else for the which necessary?

MR. S. ABADY: Nothing, your Honor.

THE COURT: Thank you, very much. You're excused.

(Witness excused)

THE COURT: Call the next witness.

MR. S. ABADY: Your Honor, at this time we would like to call the plaintiff William Gasperini to the witness stand.
Judge, can I ask what time do you expect to break for lunch?

THE COURT: You can ask.

MR. S. ABADY: What time do you expect to break for lunch, Judge?

THE COURT: When I'm ready.

[210] WILLIAM GASPERINI, called as a witness by the plaintiff having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. J. ABADY:

Q. Bill, what is your profession?
A. I'm a journalist.
Q. Specifically what type of journalist?
A. I work in three different media, print, that is writing for newspapers, radio and photo journalism.
Q. By whom are you presently employed?
A. CBS news and the Christian Science Monitor.
Q. How long have you worked as a professional journalist?
A. Roughly eleven years.
Q. Who have you worked for?
A. In addition to CBS and Christian Science Monitor I've worked for UPI, United Press International, I've worked for McLean's Magazine in Canada, that's the largest news magazine in Canada, I've worked for the Canadian broadcast, I have worked for In These Times, a weekly political and economic analyst publication out of Chicago, I've worked for Pacifica News Service, a news agency based in San Francisco, and the Kansas City Star, Saint Petersburgh Times, Oakland Tribune and other newspapers.
[211] Q. I show you now what's been previously marked Plaintiff's Exhibit 15, press credentials.

MR. MONTBACH: We don't dispute that he's a print journalist, your Honor. I don't know why we need his credentials.

THE COURT: I don't either. Do they have anything to do with the value of the slides?

MR. J. ABADY: I think they do.

THE COURT: What is it?

MR. MONTBACH: His press credentials.

THE COURT: If it will save time, I'll take his press credentials. Show them to the clerk. Let me look at them. If you offer it in evidence you're not going to waste a lot of time like have you ever been to Colombia or to, you got one here you can't even read.

MR. J. ABADY: I'd like to offer it into evidence, Judge.

THE COURT: Exhibit 15 is received in evidence with the understanding that you will not duplicate it by interrogation.

(Plaintiff's Exhibit 15 for identification was received in evidence)

MR. J. ABADY: I would like to establish where he's worked.

THE COURT: He can tell where he worked in [212] Central America. All the slides that are lost are Central American slides, right?

MR. J. ABADY: Yes. But I think—

THE COURT: What you think is vital to you but my concern is to address the value of these slides. We've spent a whole morning and we haven't learned anything that improves or disproves the value of the slides.

MR. S. ABADY: Judge, if I may, in our brief on page 21, we have discussion—

THE COURT: I'm not concerned with what's in the brief. Just interrogate the witness.

Q. As part of your work as a photojournalist, have you traveled throughout the globe?

A. Yes, I have.

Q. Do you speak—how many languages do you speak?

A. I speak five languages.

Q. What are they?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. In addition to English I speak Portuguese which I learned in Brazil, I speak Spanish, I speak French and Russian and I'm still in the process of improving my Russian because I live currently in Moscow.

Q. Can you explain what the importance of language to being a photojournalist is?

[213] A. The importance of language is when you are living in a region and you're based in a region which is what have been in my time as a correspondence overseas, it's important to be able to communicate with the people in the country where you're living, to get a fuller understanding of the country, the culture, the people, to help you in performing your duties which in my case was to report on events that were happening and to take photographs.

Q. How was being able to speak the language relevant to being able to take photographs?

A. Well, typically when you would go into a remote region or for example into a village and you wanted to take pictures of people, if you just pointed the camera at them you often wouldn't get a very good quality photograph. If you see someone who looks totally different, totally strange, you would need to have a little time to establish some rapport. Being able to speak the language helps immeasurably in terms of your connecting with the people. Everything that I would do, especially in photography.

Q. What is your educational background?

A. I have a bachelor of science degree from Cornell University, a major of rural sociology development studies. I received that in 1980. Subsequent to that I studied at California State University Heyward, I have a teaching credential for primary level in Spanish bilingual [214] educational emphasis.

Q. What was the importance of your training in rural sociology to taking photographs?

A. Well, rural sociology and development studies decided to major in that after I had lived in Brazil, worked as a social worker for almost two years. It was also my introduction to Latin America. It is a way to better understand the dynamics of what's going on in what's commonly referred to as the

Third World which includes Latin America. It's important to gain a better understanding of what the reality is in these countries, why there is poverty, why there's a need to help people, why there's political turmoil, civil war.

Q. What did you do after you graduated from Cornell University?

A. I worked in Mexico for two professors for Cornell University in two different research projects and then I traveled for the first time to the Central American region which at that time was in a lot of turmoil in both Nicaragua and El Salvador. And while I was at Cornell from 1978 to 1980 I had become very involved with groups there that were interested in what was happening in Central America, so I wanted to have a firsthand look at what was going on.

Q. Was the work that you did in Mexico the first time that you had been to Latin America?

[215] A. No, I had been to Brazil from 1975 to 1977 where I worked as a social worker on a Peace Corp type of a program. It wasn't the Peace Corp but it was similar. But my trip to Mexico in 1980 was the first time I had been to Mexico and the Central American region.

Q. When you came back from Mexico, what did you do?

A. I located in the San Francisco Bay area, specifically in Oakland, and began to work in a number of jobs including my first bona fide job in journalism which was for an agency called Interpress Service, a news service based in Rome and covers basically issues in the developing world. I worked for them for eight months when the decision was made to close the Oakland office for various reasons. After that I worked for two years as a teacher in a Spanish bilingual school in Oakland, in the inner city part of Oakland.

Q. Did there come a time when you launched your career as a foreign correspondent?

A. All through the time I lived in California up to the end of 1983 I was continuing my interest in the region of Central America, I had a lot of colleagues who were going there and coming back, I went down again on two different trips during that time. I also had intention to become a correspondent. I made a deliberate decision in 1983 to leave Oakland and

relocate to Central America to work as a [216] journalist. To do that, I worked as a volunteer for a local radio station to learn radio skills, and I moved to Nicaragua in the beginning of 1984.

Q. And why did you choose Central America to travel to?

A. Because of my longstanding interest in the region, because of the turmoil that was continuing because there was a lot of press interest. At the time it was becoming the dominant news story, foreign story in all the newspapers, media in the United States. It was a region of vital interest to the United States. I felt the American public, having been there already, I felt the American public didn't understand the full dimension of what was happening and why, especially the U.S. involvement in the conflicts there and I thought it was my, I felt a need to go there, not only for my own career development but also to try to better inform the American public about what was going on.

Q. When you say you went there partly for your own career development, what do you mean by that?

A. I had decided that the time had come for me, if I wanted to become a journalist, to do it full-time.

Q. Why did you go abroad rather than stay in the United States?

A. I think it was a decision because again I was [217] keenly aware of what was happening there, I felt the opportunity to work, to start a career in journalism was better there. I could have remained in the United States and perhaps have earned more money than I did subsequently. There are a lot of different variables. It was a risk. I knew there was a certain amount of sacrifice involved, that's why I stayed in Oakland teaching to be able to build up a little bit of a saving so I could begin my career in Central America without having to have a steady paycheck. I just felt it was the logical place to go for many reasons.

Q. And how long was your initial trip as a professional photojournalist to Central America, how long did that last?

MR. MONTBACH: Objection. There's been no testimony of being there as a professional photojournalist. Radio journalist is what he was testified to.

THE COURT: You can ask him about that.

Q. What kind of work were you doing when you first went to Central America?

A. I began working for several radio stations that I had connections to, I began writing for In These Times, I was taking photographs from day one and I stayed the initial time was from the beginning of 1984 until the fall of 1986.

Q. And were you working specifically as a photojournalist as of your first day in Central America?

[218] A. Yes.

Q. And after finishing that first two and a half year stint in Central America, where did you go then?

A. I came back to California for a brief vacation and made the decision to travel to Asia, what you could probably describe as an unofficial sabbatical to visit a different region. I was so engrossed by what I had experienced in Central America, I felt that seeing a different region that was similar but different, would help broaden me in terms of my perspective and understanding. I traveled to Asia and to the countries of South and Southeast Asia and spent a year there before returning in the fall of 1987.

Q. Did you work as a journalist and a photojournalist while you were in Asia?

A. Yes, I did.

Q. Did there come a time when you returned to Central America again after the Asia visit?

A. I returned in the fall of 1987, I think it was in November.

Q. Can you explain to the members—did you begin to work again as a journalist and photojournalist?

A. Yes. I continued working as I had when I left and remained through the end of 1990, three more years there.

[219] Q. Can you explain what was going on in the region when you returned?

A. The conflicts were continuing, especially the civil war in El Salvador. But there was a new dimension. In 1987 the presidents of the five countries signed a peace agreement wherein a peace process was under way, a process of negotiating in the countries that were in conflict. So that became a

very dominant part of the news story, the ongoing peace process. So the two dominant stories that I covered, although there were many, were the peace process as well as the ongoing conflicts themselves, especially in El Salvador and Nicaragua.

Q. And in addition to El Salvador and Nicaragua did you also work as a journalist and photojournalist in other countries in Central America?

A. Yes. In 1989 I also traveled twice to Panama because of the situation there, the regime of Noriega who was ultimately overthrown by a US invasion in the end of 1989. I went there in May of that year to cover the elections which Noriega then annulled and tried to eliminate, and I also returned to cover the aftermath of the invasion.

Q. Was there any country in Central America during your approximately seven years between 1983 and 1984 and 1989 that you did not work in as a professional journalist?

[220] A. Was there any time?

Q. Any country? Did you work in all the Central American countries?

A. Yes. I worked in all the Central American countries and towards the end of the 80s I began to include Cuba a couple of times, including Mexico, including Colombia and I also made a trip to South America to Paraguay, Bolivia, Peru.

Q. Were you working as a photojournalist throughout that time?

A. Throughout that time.

Q. In 1990, where did your career take you?

A. 1990 Nicaragua had been the place where I was based throughout this whole period. The war there was coming to an end because of the peace agreements, because of the elections which ousted the Sandinista government in February of that year. I reached a point where I began to feel that it was time to move on to a new region. I wasn't sure exactly where I would go but that, of course, depended on what CBS, which is the company I was working for most of the time, felt was proper. And in August of that year, when Saddam Hussein invaded Kuwait, that provided the next opportunity.

I left Nicaragua in the fall of 1990 and went on to the Gulf in early 1991 to cover the Gulf War.

[221] Q. And how long did you remain in the Middle East covering the Gulf War?

A. I was there for the first five, well in the Gulf region from January until May of 1991. And then I, that was for the Gulf War and the aftermath in Kuwait and in Iran and in southern Iraq. And then I moved to Egypt and spent the summer reconnoitering and deciding where to go next, doing some work there, in a sense unwinding from the Gulf War which had been a very intensive time for me. And then I made the decision to move to Moscow after August 1991 when the coup attempt against Soviet president Gorbachev happened. And CBS had indicated that there was a real need for more coverage of Moscow.

So I up to that point had maintained all my life an interest in the Soviet Union and for obvious reasons and felt it was a very important place to get to know and to experience and so I moved to Moscow in the fall of 1991 and have been living there ever since, based in Moscow, covering events in Russia and the other former Soviet republics. On occasion I have been sent to locations, including Somalia in 1992, and most recently I was sent just this month to France to cover the anniversary of the D-Day invasion of 1944.

Q. And during that—does that bring us up to date?

A. That brings us up to date.

Q. And during those eleven years, what media were [222] you working in?

A. I was working in print, in radio and in photo journalism.

Q. In your career as a journalist, how many articles have you written?

A. I've written hundreds of articles.

Q. I'd like to show you what's been marked as Plaintiff's Exhibit 16A and 16B which have been previously provided to adversary in discovery. I ask you if you recognize those.

A. Yes.

Q. What are they?

A. They're copies of articles of mine that have appeared in various publications from 1983 to the present date.

Q. And you're the author of those?

A. Yes.

MR. J. ABADY: I move those into evidence, Judge.

MR. MONTBACH: No objection.

THE COURT: Received without objection.

(Plaintiff's Exhibits 16A and B for identification were received in evidence)

THE COURT: These are your best articles or your representative articles?

THE WITNESS: All of them.

[223] THE COURT: All of your articles?

THE WITNESS: Give or take a few that may have gone astray.

THE COURT: All of those that have been published?

THE WITNESS: All those that appeared in print. Radio, no.

Q. How many times have you done a radio report? How many reports have you filed?

A. In my career I've filed as we call it thousands of radio reports.

Q. And in your career as a photojournalist, how many photographs have you taken?

A. Thousands. Approximately 10,000 to date.

Q. And do you own professional photocopying equipment?

A. Yes, I do. I use mostly Nikon cameras.

Q. Can you explain to the jury your repertoire of equipment?

A. I have two camera bodies, to have different kinds of film available at all times, including a series of lenses including a telephoto lens, 210 millimeters, which allows you to take a photo from a distance and get much closer to the subject. I also have a wide angle lens which allows for a much broader view. In other words the range is from a [224] wide angle to a close up from a distance. Flash units. I carry a camera bag that has all this equipment in it including filters for

during the daylight time, polarizing filers which you use often to cut down on glare and haze and things like that. I've had a number of camera bodies over the years as well as camera bags. I've always maintained roughly that quantity of equipment.

Q. Have you sold your photographs over the years?

A. Yes.

Q. Up to date, who have you sold the photographs to?

A. I sold photographs to various publications, mostly newspapers, primarily to a company, stories that I've written for them. Some of those photographs are included in the volumes here with the stories that I submitted to those newspapers. I also have a number of photographs that I took during the Gulf war at a stock agency in New York, Impact Visuals. I also sold photographs for the use in a computer CD ROM format for a program on Central America. I received a grant to produce a series of slide shows on my travels in Asia. And of course I also helped to produce and contributed the photos to the Guidance Associates video.

Q. Showing you what's been marked previously 19B and 19A in evidence, copies of these have been previously provided to the adversary, I ask you to identify those, tell the jury what those are.

[225] A. These are two versions of a computer program about Central America entitled Hidden Agenda. Approximately 15 of my photographs of Central America were used for the graphics of this program. The program was produced and published at the end of 1987.

Q. Why are there two?

A. One is a spring board. This is a scholastic edition which is for school use and this is a spring board which is for general use. It's general consumer use.

Q. In addition to the photographs that appear in the program, is one of your photographs on the cover?

A. Yes. One of my photographs is right here in the center.

MR. J. ABADY: Judge, at this time I'd move that into evidence.

THE COURT: Will the jury be able to read it or see it?

MR. J. ABADY: They'll be able to see it and read the packaging.

MR. MONTBACH: Objection, your Honor.

THE COURT: Unless they can view it it can't be received in evidence. I'm going to have to make arrangements for the jurors to have down time so they can look at these other things in the jury room.

MR. J. ABADY: I don't anticipate that the jury [226] would need to actually view the video but I do think that they should see one of the uses that his photography can be put to.

THE COURT: Can we limit the offer to the cover?

MR. MONTBACH: The cover is fine.

THE COURT: The cover is received in evidence. You're not to speculate as to what the inside of it shows. Now on the three volume video I assume they have to look at that because that will show them some pictures. Just consider the cover.

(Plaintiff's Exhibit 19A and 19B for identification were received in evidence)

Q. How much were you paid for the use of your photographs in that?

A. Approximately $2,000.

Q. Showing you now what's been previously marked Plaintiff's Exhibit 17, it's also been provided previously in discovery. I ask you if you recognize that?

A. Yes.

Q. Can you tell the jury what that is?

A. This is a magazine called Nicaraguan Perspectives. It was a magazine published throughout the 1980s in San Francisco dealing with the issue of the situation in Nicaragua, especially the Contra war, so-called Contra war and the U.S. involvement in that country.

[227] Q. Do several of your photos appear in that publication?

A. Yes, they do.

MR. J. ABADY: At this time I would offer that in evidence.

MR. MONTBACH: I object to that.

THE COURT: Show it to counsel. I'll rule on it next time we have a recess. What's the exhibit number?

MR. S. ABADY: 17, Judge.

THE COURT: After you finish looking at it, hand it to the clerk. Frame the next question.

Q. In addition to your sale of photographic images over the years to magazines, different publishers, did you also have occasion to do slide shows?

A. Yes.

Q. Educational slide shows?

A. Yes.

Q. Were you invited ever to make a professional presentation at the university level?

A. Yes, I was.

Q. I'm showing you now what's been marked as Plaintiff's Exhibit 21. I ask if you recognize that.

A. Yes.

Q. Could you tell the jury what that is?

A. This is a letter pertaining to a presentation **[228]** that I made at SUNY Purchase, State University of New York, purchase, in which I showed slides that I had taken during my travels in Asia and also discussed my knowledge of Central America. It was a long, one day forum to academics, teachers from around the southern New York State area.

Q. And were you paid as a professional photojournalist for having done that?

A. Yes.

Q. You received an honorarium for that?

A. Yes.

Q. Approximately how much do you recall?

A. I believe it was approximately a thousand dollars.

Q. And that letter is a confirmation of that?

A. It's a confirmation of the event.

MR. J. ABADY: At this time I'd move Plaintiff's Exhibit 21 into evidence.

MR. MONTBACH: No objection, your Honor.

THE COURT: Received without objection.

(Plaintiff's Exhibit 21 for identification was 21 received in evidence)

Q. Bill, how did you get started in photography?

A. I began taking pictures when I was a teenager. A friend, the father of a friend of mine was a professional photographer. He taught me the nuts and bolts of taking **[229]** pictures, other than Instamatic type pictures that I had taken when I was even a child. I began to learn the difference in the kinds of cameras, the kinds of lenses, the meaning of f-stop, depth of field, how to keep things in focus, how to frame shots, how to make shots look more interesting.

This man's name is John Ashworth. He lived in my community and he would have a weekly session with myself, one of my brothers, a couple of other friends of ours and we learned the nuts and bolts. After that I began taking pictures when I was still in high school with another friend and other colleagues and throughout the course of my life I have always taken pictures.

Once I got to Central America, working in a more professional capacity. Training in photography never stops, you're always learning new techniques. I learned from a lot of top quality photographers including those who work for publications such as National Geographic, Newsweek, other magazines. I've been with them many, many times in situations and I've learned as I've done it.

Q. Do you have any academic degree in photography?

A. No.

Q. And why is that?

A. Photography is something I think you learn more by experience. You could have formalized training, perhaps. **[230]** But I think it's true in journalism in general. It's possible to get a graduate degree in journalism but I think it's

something that a person has talent for or an eye for in the case of photography and it's more of an experiential kind of a thing that you acquire as you go along.

Q. Is it common for professional photographers to not have an academic training in photography?

MR. MONTBACH: Objection.

THE COURT: Some do and so don't, isn't that true?

THE WITNESS: Some do and so don't.

Q. Could you explain to the jury, Bill, the difference between photography and photo journalism?

A. Photography, taking pictures can be, in a common sense, is having a camera, taking a picture to remember an event, to remember a person, to remember a place, the kind of thing that ends up in the family scrap book.

Photography, and especially photo journalism is something else. Photography is something where you're trying to make a statement in the photograph. You're not taking it to show here's my Aunt Millie on vacation. You're trying to have an image that tells people a story, tells people something about a place or a person or an event.

Photojournalism is that process, the idea of conveying something by being in a place, by understanding a [231] place, a people, a culture, and be able to convey that through photographs, through visual images.

Q. And is that why language and living in the region is important?

A. Yes, I would say so.

Q. Bill, what percent of your income up until now has been derived from the sale or the immediate marking of your photocopying material?

A. It hasn't been substantial. It's been between five and ten percent on average over the course of the years. There are many reasons for that but it's never amounted to a dominant part of my income.

Q. And what would the dollar figure be roughly of five to ten percent?

A. It would range from a few hundred dollars in a given year to a few thousand dollars.

Q. And why have you not sold more of your photography up until this point?

A. I made the decision early on that I was involved in the process of news gathering, particularly in the years I lived in Central America. It was important to focus at the time on different media that I was working in. And the immediate use of print articles and radio reports was evident. It's not something that has lasting value.

And that's why I have been a reporter as well as [232] a photojournalist. My photography is something else. It has a more long-term use value. I had intention to use my photographs in a project sense. Unlike some news photographers who focus only on taking pictures, I made the decision that my photography would be something that I would build over time, I would accumulate a body of work from which I could then make use of.

The other problem was logistics. At the time Nicaragua was under an economic embargo from the United States. Relations with very strained. It was difficult for me to see my photographs. I would take pictures, I would accumulate certain numbers of rolls of film, I would take them back to the United States with me, I would come back on the average once a year and have them developed.

But to be able to make use of them required a lot of editing, required the need to go through them, to select the ones that were appropriate to send them into agencies and I decided I didn't have time to do that at that point and it was better to build up a reserve or stock. Which is what I did. And then later on with that body of work I would put them to different uses, such as the game, the video, other projects.

Q. What is the typical fee for compensation of a photograph used to accompany a story in print?

A. The fees that you receive —

[233] THE COURT: Talking about his fees?

MR. J. ABADY: Yes.

A. My fees are typical fees that newspapers would pay, usually for a photograph it ranged, it was $50 was average, 50 to a hundred dollars sometimes. Somewhere in between. But in an immediate news sense, that would be a typical fee. That's what I would receive.

Q. When you say typical, you mean that's what was said paid to photojournalist or photographers for an immediate news photo?

MR. MONTBACH:Objection.

THE COURT: Sustained.

MR. J. ABADY: I think he has a basis —

THE COURT: He can answer but you want to rephrase his answers. But you can't do that. Ask the next question.

MR. J. ABADY: I think it's clear, Judge.

Q. When you say that was a typical fee, what do you mean?

A. That was the fee that I was told I would receive when I contacted a newspaper. I would say I have photos to accompany this story. Great. Send them in, we'll look at them. If you use them, how much do I get? $50, $100, $75, whatever it was. Other colleagues in the same situation, that's what I would receive, they would receive similar [234] kinds of fees.

THE COURT: You did that while you were in Nicaragua?

THE WITNESS: Yes.

THE COURT: When you get that payment, who owns the picture?

THE WITNESS: Excuse me.

THE COURT: After you receive the payment, who owns the picture?

THE WITNESS: The payment is only a one-time use by that publication. They would also return the original and I would

be able to use it any time after that. It was only for one-time use.

Q. I'm going to show you now what has been collectively marked 18A through J. I give a copy to the adversary and a copy to the court. And I ask you if you recognize this?

A. Yes, I do.

Q. What is this exhibit 18?

A. Examples of my photography from different parts of the world.

Q. Photographs that you took?

A. Photographs that I took.

MR. J. ABADY: At this time, Judge, I'd move these into evidence.

[235] MR. MONTBACH: I'll object, your Honor. Not one of them is of Central America.

MR. S. ABADY: That's right, those were lost.

THE COURT: That goes to the weight of it. Are none of these Central America?

THE WITNESS: None are from Central America.

THE COURT: Do you have any of Central America?

THE WITNESS: I have outtakes, ones that I don't consider to be of top quality.

THE COURT: Received in evidence.

MR. MONTBACH: I object to the ones taken after the ones in Central America.

THE COURT: I assume that his ability as a photographer hasn't changed materially before and after. These are given —

MR. MONTBACH: I don't know if that's a safe assumption, your Honor.

THE COURT: These are given to you for the purpose of assessing the quality of his work, members of the jury.

(Plaintiff's Exhibits 18A through J for identification were received in evidence)

Q. Take the first photograph and just hold it up to the jury and could you just explain where it's from and the conditions under which it was taken?

[236] A. This is from Tibet. It was taken in late 1986 when I visited that company. It shows people there during harvest season, harvesting there's the barley which is the staple food there. In the background there's the ruins of an ancient citadel and the skyline of the Himalayan mountains. This is not far from where Mount Everest is located. It was taken on my Asia travels.

MR. S. ABADY: Your Honor, I'll distribute these to the jury?

THE COURT: Yes, they can be shown to the jury.

A. The second photograph is also taken in Tibet. This was taken in the capital city of Lhasa. It shows a musician playing an indigenous instrument and a number of people gathered around singing and watching.

Q. The next one?

A. This photograph is also taken on my Asia trip. It was taken in Nepal which is the country just to the south of Tibet, in between Tibet and India. It shows a fisherman casting his net in a stream.

The next photo shows two people who are commonly referred to as untouchables in India, people at the bottom of the caste system in that country, sweeping the street. I believe this was taken in northern India also on that Asia trip.

Q. You can proceed with the next photo.

[237] A. This is a picture taken in Pakistan. It shows a typical metal working shop, two men making craft items in the foreground and in the background a statute of the one of the Hindu gods, the elephant god Ganesha. This was taken in one of the remote villages that I visited in remote Pakistan.

Q. When you say remote, what do you mean?

A. A place that was fairly off the track, the beaten track and involved a certain amount of effort to get to.

The next photograph was taken in northern Sri Lanka, which is a country that's been convulsed by civil war for eleven years now, a very bloody civil war. These are two Tamil Tiger rebels in the Jaffna Peninsula. They have seized this area and controlled it. I had to get special permission from the government which is fighting against the rebels, the rebels want to separate that part of the country and declare their own state. A very conflictive war zone which was very, very similar to the war zones I was familiar with in Central America, particularly El Salvador and I was flown up there after a lot of bureaucratic problem, I was flown up to the area by helicopter, walked across a no-man's land, meaning a barrier where the government side was on the one side, and the rebels were on the other and then I spent several days on the rebel side, interviewing them, taking pictures, getting their side of the story basically.

[238] The next slide was taken during the Gulf War. It shows one of 700 oil wells that were set on fire deliberately by the Iraqi troops as they were withdrawing, as the allied forces were advancing into Kuwait. This picture, although it looks like it was taken in the dead of night, it was actually taken in the middle of the day, in the Gulf, very bright sunshine day, but because of the number of fires and the thick black smoke that covered the entire horizon, it seems like it's the middle of the night.

Q. This was taken in the middle of the day?

A. Middle of the day, yes.

Next photograph is another picture that was taken during the Gulf War. It shows an abandoned Iraqi tank and some of the remains of whoever was commanding the tank, and then you can see in the background several of the oil well fires raging. It took until the end of 1991 for teams from the United States and Canada to put out the fires at great risk.

Going into the oil fire area was always very kind of precarious situation because of the intense heat and of course we covered our noses and mouth because of the fumes. It was a very bleak kind of a place. Almost surreal to drive out of a bright sunshine day into this blackness which was just horrifying to see and also to think that all of this oil was going

up in smoke and the cost to the [239] environment it was causing.

This photograph was one of those that I placed with the photo agency Impact Visuals and it appeared on the cover, front cover of a magazine or a newspaper in Texas.

Q. Just to interrupt you just for a minute. You mentioned that this was on the front cover of the Dallas Observer —

MR. MONTBACH: Objection.

THE COURT: I'm sorry. Will you just continue with these exhibits. Don't butterfly around. If you want to offer that later on you can mark it as an exhibit and lay a foundation for it.

MR. J. ABADY: Yes, Judge.

A. These photograph shows children in Somalia. This was taken in January of 1991 after I had been there, I was sent on assignment there, I spent five weeks in Somalia itself and then some months after in other countries of Eastern Africa.

It shows children who had been starving receiving food from United Nations workers in one of the many, many feeding centers in Mogadishu, and this was the whole reason for the intervention led by the United States to restore order in that chaotic country and to feed the people who were starving.

The following photograph is also in Somalia. [240] This is a convoy or a brigade of soldiers who were a part of the multinational force. These particular soldiers happened to be from Botswana, another country in Africa, and it's also taken from Mogadishu, the capital.

The following photograph is also in Somalia. This was a food drop. After the initial intervention feeding people in the major urban areas, there was an effort made to get out to the really remote parts of the country and bring food in. People in these isolated regions were without food and were quite desperate and I went out in one of these helicopters to this area as they were bringing the food in to deliver it to the people.

And the final photograph is one taken in Moscow where I currently live. It shows one of the hard line communist groups demonstrating in the streets of Moscow. These sorts of demonstrations last year, which ultimately led to a major

showdown between president Boris Yeltsin and the Congress, and which you might recall seeing in the news a big battle at the Parliament building when Yeltsin ordered in the tanks to fire on the Parliament to dissolve the old Parliament. These demonstrations were often quite violent, quite antiAmerican in tone. These are people who are calling for the restoration of the Soviet Union. The picture in the middle is of Vladimir Lenin, and this is just one of the groups that still hopes that the Soviet Union can [241] somehow be restored.

Q. Just very quickly, I show you what's been marked as Plaintiff's Exhibit 26, a copy of which has been shown to counsel for defendant, and I ask you if you recognize that.

A. Yes. This is a copy of the Dallas Observer from August 1991. It is a weekly published in Dallas and has one of my photographs on the front cover as well as one on the inside in the accompanying article which is called Highway to Hell. It's one of the photographs that I have included there.

MR. J. ABADY: Judge at this time I'd move 26 into evidence.

MR. MONTBACH: May I see it, your Honor? Can you identify where the one on the inside is?

THE WITNESS: Sure. The one on the inside is on page 13.

MR. MONTBACH: No objection.

THE COURT: Received without objection.

(Plaintiff's Exhibit 26 for identification was received in evidence)

THE COURT: That represents a sale by you?

THE WITNESS: It represents a sale by me through a stock agency called Impact Visuals.

Q. Bill, Mr. Montbach highlighted the fact that there are no photographs in this group from Central America. [242] Could you tell the jury why that is?

A. Because the work that I consider of the highest quality, similar to these images, I no longer have.

Q. Where are they?

A. I have a lot of what are called outtakes which are images that I don't think have the same kind of marketable quality that those do.

Q. And what happened to the best and most select images from Central America?

A. They were lost. I don't have them any more.

Q. How many were there?

A. 310.

Q. Do you have duplicates of some of the 310 that were lost?

A. Yes, some of the images that I included in the video or gave to Guidance Associates for use in the video were included in a slide show that I had done in Horace Greeley High School in Chappaqua, New York, before that time in a show about Central America. There are roughly 40 of the 310 that were in that show. Those were duplicates that were made from the originals. The originals were those that were given to Guidance so the 40 that exist in the show at the high school are duplicates.

Q. Can you explain why you can't make a print of this quality with those duplicates or what would happen if **[243]** you would try?

A. Duplicates are never as good as the original. Every time a copy is made of a slide or a photograph, it's never quite as good. You would see more grain, you would see, the picture just wouldn't have the same sharpness, clarity of detail. Normally, for publication purposes, duplicates aren't acceptable and I didn't feel it was right to use a duplicate to make an image such as these.

Q. When you say that they're not marketable, meaning that they wouldn't be salable on the market.

A. Well, yes on a long-term basis, if I were to try to market duplicates, the company I would give them to would say are these originals or are they duplicates, and I would say they are duplicates and if the company were pressed they might make use of one but they would certainly not, they would certainly want to have originals. They would require, most companies in publication would require that they only use originals for the purposes of publication.

Q. Mr. Goodman had mentioned on his testimony—

THE COURT: No, just simple questions.

Q. How were the 310 slides delivered to Guidance Associates?

THE COURT: Is that significant? It's conceded they got them. They're gone. The value that this jury will put on those 310 slides is not affected by whether they were **[244]** delivered by ox cart, kangaroo. Please just stick with the case.

MR. J. ABADY: Judge, fine. I have no interest in going into this area if the defendant corporation will stipulate that packaging is not an issue.

THE COURT: Just try your case, will you please.

MR. J. ABADY: The only reason I'm going into this is because the defendant corporation has made an issue of it, Judge.

THE COURT: They didn't make an issue of it. There's only one issue in the case. What are these things worth.

MR. J. ABADY: I agree with you completely.

Q. Bill, prior to editing and—prior to delivering the side, did you conduct an edit?

A. Yes, when we made a decision to produce the video or when I was asked for the slides to contribute to the video, I began an extensive edit. That means I looked through the larger body of work that I had amassed, which was roughly 5,000 slides over the years I lived in Central America, and I proceeded to boil them down to the best.

And then we had made an agreement that we would meet and discuss the images and from the group that I had selected we would, the original intention was to have the video be an hour long so I was trying to think of how many **[245]** images we would need to illustrate that much time. And normally, roughly 80 or as many as 120 slides per 20 minutes in a given slide show and this was going to be a video format of a slide show essentially.

So we agreed to meet at the Guidance Associate premises and make a final, final edit. In other words, I would bring in a larger group of images that I thought were acceptable and then we would together decide on how many would ultimately be used in the video itself.

Q. How long did it take you to do that edit of the 115,000 slides?

A.Well, I was working overseas, of course, at the time.

THE COURT: He just asked you how long.

A. It took roughly a year altogether. But of course I wasn't working on it full-time.

THE COURT: How much in hours did it take to do the actual editing?

A. I would say it took probably a couple of hundred

Q. Can you explain whether it is typical for editing to reduce the amount of slides to that number to get the select images?

A. Well, in doing an edit, making an edit is an extensive process. You have to go through a large number, **[246]** body of work, you have to pull out, you have to sort and organize, you have to say this covers this topic, this covers this topic.

I was also working of course on the script at the same time. I was isolating audio cuts that I had gathered in my radio work to help be sound effects in the video. To me the project was a mixing of the three media that I work in for educational purposes that I thought was very sound. I had been a former teacher, especially.

So in developing the script I would often do revisions of the script, I would look for slides that would, I thought, illustrate certain points I wanted to make and I wanted to use the best and most dramatic images and to do that it just took a lot of time.

Q. What is the typical percentage when a photographer shoots a large body of work, like several thousand images, what is the typical percentage that has a permanent marketable value?

MR. MONTBACH: Objection.

THE COURT: If he understands the question and knows the answer, I'll let him do it subject to cross-examination.

MR. MONTBACH: For him or for every photographer around?

THE COURT: I didn't frame the question. Why **[247]** don't you try again.

Q. Are you familiar with standard practices of professional photography as a professional photojournalist?

A. Yes.

Q. What is the typical percentage of the photographer's work when he makes a large shoot that has a permanent, lasting market value? What is that range?

MR. MONTBACH: Objection, your Honor.

THE COURT: I'll sustain the objection.

Q. What was the range for your work?

A. I can understand or I know that in the industry, the general rule of thumb is between 1 in 15 and 1 and 20. In other words, if you have a large body of work, such as I had, only a small percentage of those images would be useful in publication, would be useful over a long period of time and so I thought that the 300 that I worked on developing for this show were the best of my 5,000 slides. And that, to me, was a typical ratio. Some photographers would argue with that. They would say perhaps only 200. Maybe some would say 400. One in 15, one in 20. So since there were 5,000 slides roughly it was about right, the ratio.

MR. J. ABADY: Could I just have one moment, please?

(Pause)

Q. I want to talk a little bit about—

[248] THE COURT: Just frame a question. No introductions.

Q. Regarding the 300 images that were lost by the defendant corporation.

THE COURT: It was 310 last I heard. Maybe you've given up on 10.

MR. J. ABADY: I stand corrected, Judge.

Q. 310 images. Were there photographs of famous people that you took?

A. Yes.

Q. From what countries in Central America?

A. From all of the countries in Central America. Guatemala, Honduras, Nicaragua, El Salvador, Panama, Costa Rica.

Q. Would you tell the people what famous people were the subject of your photographs that the defendant lost from Nicaragua?

A. As an example, the president of Nicaragua at the time, Daniel Ortega. He was very much in the news all the time, he was a very controversial figure. President Reagan—

THE COURT: Just give us the names. Don't tell us about what President Reagan did or did not do unless you want to make this trial into a career.

A. Daniel Ortega, president of Nicaragua, the **[249]** current president of Nicaragua, Violeta Chimorzo. In Costa Rica, the former president, Oscar Arias, who was the author of the peace plan, winner of the Nobel Peace prize. All of the presidents. I attended many of the summit meetings.

THE COURT: Just answer the question. He asked you who the famous people were.

A. Fidel Castro when he came to visit Nicaragua in 1984. Manuel Antonio Noriega, former dictator of Panama. And on occasion other people who would come to visit such as the prime minister of Sweden.

Q. What were the conditions under which you took photographs, for example, of Manuel Antonio Noriega?

A. I saw Noriega a couple of occasions, one particularly when he was watching an antiAmerican play after he had annulled the elections in 1989 with various other journalists during this event, I got a very clear view of him as he sat and watched and laughed at the play. As he was leaving, everyone tried to interview him, talk to him. This is after the election.

Q. What about the presidents of Nicaragua, what were the circumstances of those photographs?

A. Well, in the case of Daniel Ortega saw him more than any of the other people because I lived in Nicaragua.Was all the time speaking in public, big rallies. Sometimes I would be somewhere in the city and I would see suddenly a **[250]** convoy of vehicles and he would show up, get out of his vehicle and shake hands with people. So I could get pictures of him there. Attending the summit meetings, both in Nicaragua and other countries and during the election campaign in 1984 and in 1990, as well as Violeta Chimorzo. I took many pictures of her during that time.

Q. What was her public office?

A. Well, she is now the president. She was elected president in 1990. That's what she is now. Up until 1990, she was just an ordinary person. She had been an original member of the government that took over in 1979 but she left after a time.

Q. In addition to the photographs of famous personages in the region, did you also travel in war zones?

A. Yes. I traveled on many, many occasions in war zones, particularly in Nicaragua and in El Salvador.

Q. Why did you travel in those areas?

A. Because this was the main story, the conflicts, what was happening in the conflicts, especially in the case of Nicaragua, the Contra rebels who would attack farming villages, cooperatives in the north of the country. We would often go up into the countryside after these attacks to document what had happened and how the people of the country were suffering to try to get to the root of what the conflict was about, who did the people in the countryside **[251]** support and why.

Q. Did you take photographs in Nicaragua in combat zones?

A. Yes.

Q. Could you tell the members of the jury what some of the circumstances were surrounding —

THE COURT: This is about the 310 now.

MR. J. ABADY: Absolutely. All these questions are about the 310 slides that were lost.

Q. Could you tell the members of the jury about the slides that you took in war zones in Nicaragua that were lost?

A. Well, one occasion that stands out is in 1985 when I was accompanied a ship, a boat that went down the river that formed the border between Nicaragua and Costa Rica with a group called Witness for Peace. The reason they came was to go to the war zone, the river at that time was a conflict area between one of the Contra groups and Sandinista soldiers and this group had the intention of going down the river to try and say, you know, stop the fighting, there should be peace.

This was a group of activists, mostly from the New York area, and I was one of several journalists that accompanied them on that trip. And we were fired on by the Contras at one point and held captive overnight. We were **[252]** led into the woods. We were there as journalists documenting this and were released the next morning by one of the commanders of the Contras who said we could go on. For a time it became a big news story because it looked like a group of Americans being held against their will in the jungle. There were many, many, many other occasions where I would go up into the war zones.

Q. Just to interrupt you for a moment with respect to that incident, the kidnaping in Nicaragua, when you said you were held against your will, what do you mean by that?

THE COURT: Are there pictures reflecting the incident?

THE WITNESS: Yes.

THE COURT: His adventures may be interesting but we're concerned about lost pictures. Are there pictures concerning this episode you've just described?

THE WITNESS: Yes.

THE COURT: How many of them?

THE WITNESS: I took several rolls.

THE COURT: How many were in that 310?

THE WITNESS: I believe six or seven.

THE COURT: Is there any particular aspect of those photographs that you remember at this time?

THE WITNESS: I remember shots of the Contras standing on the hill as the Witness for Peace people were **[253]** being led off the boat. A picture of the people holding hands as they walked off into the forest. Another one of a peasant woman as she was cooking dinner in the hut where we were held overnight.

Q. Could you give some examples of the photographs that were lost that were taken in El Salvador in combat zones in war conditions?

A. Yes. The most graphic images I have were taken in 1989 when the leftist rebels launched an offensive to try to overthrow the government. It was an extremely dangerous situation, combat throughout the city. The day after I arrived, I went out with a couple of print reporters to an area and we were stopped at an army roadblock. A few moments later some shots rang out. One of my colleagues was shot and killed.

Meanwhile there were a lot of civilians trying to leave the battle zone, further up on the hillside and they were waving white flags. I also took a picture of a dead body in the gutter. Some of these were included in the 310.

Q. Who was the journalist colleague—

A. David Lundy. He was a correspondence for a British newspaper called The Correspondent.

Q. Approximately how far were you from him when he was killed?

A. I was standing roughly ten feet away from him. [254] Later in that same time, about a week later, the Guerrilla rebels came in and seized control of the Sheraton Hotel which was in another part of the city and inadvertently trapped a group of American Green Berets inside the building and there was a standoff because the army surrounded the area and I went inside the building with other journalists to interview the Green Berets and the Guerrillas.

The Green Berets refused to have their pictures taken but I did interview some of the Guerrillas, particularly one with a mask over his face. To get into the building to leave, we had to walk through a no-man's area, waving a white flag yelling "press" so we wouldn't get shot.

Q. Was there also an incident in El Salvador where you were—

MR. MONTBACH: Objection, leading.

THE COURT: Sustained unless it's tied into the 310 missing slides. If there are slides he took in that episode he can tell us about those.

MR. J. ABADY: Every question that I'm asking—

THE COURT: That's not clear from the questions.

MR. J. ABADY: Just so it's clear, all the—

THE COURT: You can't make it clear unless you say so in the questions. Did you lose slides in the last episode you just described?

THE WITNESS: Yes, I did.

[255] THE COURT: Do you have any idea how many?

THE WITNESS: From the Sheraton Hotel incident I believe there were five.

Q. Just to clarify the record, since I began questioning you about the 300 slides and we talked about the famous personages and the different combat zones, were all of those photographs photographs that were part of the select 310 slides that were lost by the defendant corporation?

A. Yes.

Q. Was there another incident in El Salvador aside from the incident at the Sheraton Hotel, aside from the incident where the British journalist was shot next to you, where you took photographs that were of a situation in danger that were among the 300 that were lost?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. Yes, there was another time when I was in a rebel-held area of the country, in other words we passed through an army check point and were near a mountain that was under the control of the rebels and they were in control of this little highway as we went along.

And government helicopter gunships opened fire on our car, they didn't know why we were there, it was a rebel area, so we had to get out of the car and take cover in a [256] ditch. I took pictures of some of the rebels that we saw there along the road and one of the helicopters as it was flying overhead.

Q. Were those images lost?

A. Yes.

Q. Who lost them?

A. They were part of the 310 that I delivered to Guidance Associates.

Q. Were there photographs taken in dangerous circumstances in Costa Rica and in Honduras?

A. In Costa Rica, no, apart from the kidnaping incident that I mentioned earlier which was on the border of Costa Rica. In Honduras, there were some pictures of the Contra rebels in one of their base camps which was located near the Nicaraguan border and took a little bit of doing to get to. There wasn't any conflict happening at that point. It was just a camp. There was always the danger of an attack by the Sandinistas but at that point the peace process had begun.

Q. While you were traveling in Central America and with respect to the 310 slides that were lost by the defendant cor-

poration, were there circumstances where you took photographs under the escort of army troops because of safety concerns?

A. Yes. I went on patrol one time with the [257] Salvadorean military and I had pictures of troops on patrol in a jungle area. Same is true of Nicaragua. We went to the conflict areas and visited a base camp of the Sandinista army and a series of photographs taken at that time were included in the 310.

Q. Can you estimate what percentage of your photographs from Nicaragua and El Salvador were photographs taken in conflictive war zones?

A. It's hard to put a number on it.

MR. MONTBACH: Objection. Very vague.

THE COURT: He's answered. I'll let his answer stand.

Q. What other types of events did you take photographs of that were part of the 310 select images that the defendant corporation lost?

A. Well, there were a lot of what I would call human interest pictures, pictures of people going about their business, farming, in their homes, street scenes. There were landscape shots. Nicaragua is famous for very spectacular sunsets and volcanoes. So I have pictures of volcanoes, of landscape beauty.

In the case of Guatemala, it's a country of very vibrant color. The indigenous people who live in the mountains wear very, very distinctive looking clothing. And I was also in Guatemala on a number of occasions during [258] festival time, including the very famous holy week processions in Antigua, where the people lay carpets of colored sawdust on the streets and they carry the float of Jesus Christ holding his cross on Good Friday. Guatemala is an incredible place for photographic images because of that, the color there.

And then there were also political type shots.

Q. Let me ask you—

A. Rallies, etc.

Q. Before you go to rallies, just to clarify, holding up Plaintiff's Exhibit 18A which is in evidence, which is a landscape I believe from Asia, is that correct, when you talk about the landscape shots that you took in Central America, would they be shots like this which attempted to —

MR. MONTBACH: Objection.

THE COURT: It's an argumentative question. He's already been allowed to show these pictures from Asia as samples of his work and the jury may infer that the quality of his pictures is similar to the quality of the lost pictures, if they wish to draw that inference from the testimony.

Q. Is that typical of the type of landscape shot that we're talking about?

A. Yes.

[259] Q. I didn't mean to interrupt you. You were speaking about other events that you took photographs of that were among the 310 slides that were lost?

A. Political rallies, particularly in the case of Nicaragua, Sandinista rallies, people waving flags, people harvesting crops, riding in carts. Again, what I would call human interest pictures which I feel is a way to convey the way the people live in these countries and what it's all about, what their lives are all about.

Q. When you take a human interest shot in Central America, is that where your training and expertise with language and the culture come into play in selecting the image and taking the image?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. You testified earlier—

THE COURT: Whatever he testified earlier the jury heard.

MR. J. ABADY: I'll withdraw the question.

Q. Did you take pictures in Central America that were among the 310 slides that were lost by the defendant corpo-

ration that included shots in areas that were very remote or difficult to gain access to?

A. Yes.

Q. Could you describe for the jury some of those **[260]** photographs that were lost and among the 310 beginning with Nicaragua?

A. Well, the most evident example was on the Atlantic coast side of Nicaragua which is a very different region, it's a jungly, marshy kind of an area and Mosquito Indians, tens of thousands of people had been evacuated by the Sandinistas when it became a conflict zone.

There was in 1985 a peace agreement and a gradual process of these people trying to return to their villages along the river and I went along with a photographer from National Geographic and we were the only two journalists who got to the river with the people when they decided to return.

It was a very remote area. There was still the danger of rebels in that area. We had to bring a Moravian pastor and a man who is considered an elder by the Indian tribes who would command enough respect in case we were stopped by the Contras to explain why we were there and what we were doing, we were just journalists and not partisan to any part of the conflict.

The logistics in getting around in the coast, and also the mountain part, the interior, are very difficult. The roads are very bad. You have to drive through rivers. When it's the rainy season you get caught in the mud all the time. You need a four-wheel drive in most cases. Some of **[261]** those, they're not even called roads in some areas. And there are also places where I had to go on foot to go to.

THE COURT: We can break for lunch at this time. Members of the jury would you please return at two o'clock, keep an open mind, don't discuss the case.

You could step down Mr. Gasperini.

(Jury not present)

THE COURT: What is the problem with Exhibit 17?

MR. MONTBACH: I thought I had not been provided with copies of the picture but I was.

THE COURT: Then after the recess it will be received in evidence. He can point out what there is there that's his work and what is not his work.

MR. MONTBACH: I would like them to at least be tabbed.

MR. J. ABADY: They are tabbed, your Honor.

THE COURT: Even so he should explain that to jury.

MR. S. ABADY: I understand. It has been, his request has been acceded to already.

THE COURT: The court will be in recess.

(Luncheon recess)

[262] AFTERNOON SESSION

2:00 p.m.

(Jury present)

WILLIAM GASPERINI, resumed.

DIRECT EXAMINATION (Continued)
BY MR. J. ABADY:

Q. Prior to the lunch break you finished talking about Nicaragua and the photographs that you took there. Were there circumstances in Honduras where you took photographs that were part of the 300 where you also had difficulty gaining access to areas or where you were photographing images that were in remote areas?

A. Yes, in Honduras the most clear example there was the Contra camps, the camps that were maintained near the Nicaraguan border by the Contra rebels. And I went in there and saw them in formation, doing what they do in the camps at that time along with their main leader who was addressing them about the ongoing peace negotiations that were happening at the time.

And there were other occasions, out to the Atlantic coast of Honduras which is very similar to the Atlantic coast of Nicaragua, had to fly out there, hike into the jungles where the indigenous people live and some of the photographs that I took on that trip were also included.

Q. What about El Salvador, were there photographs [263] taken in remote areas of El Salvador among the 310?

A. Yes, there were some when I was on an army patrol and also in the rebel zones, the areas that were under the control of the rebels and entered into the zones on occasion and would meet with some of the rebels. They would just come out of the woods and I would talk to them and I would take a picture and we were discussing, to interview them to find out their side of the story.

Q. Still talking about the same 310 photographs?

A. Yes.

Q. What about Guatemala, can you describe to the jury photographs that were among the 310 that were taken in Guatemala in remote areas or areas difficult to gain access to?

A. In several occasions I journeyed into the heartland, into the mountains, the remote villages where they wear very vibrant colored clothing. One time for a festival that was going on. And I also went up to the famous Mayan ruins of Tecal and from there went out to visit health clinics that were being set up by the government and there was one picture in the jungle up in I believe it's called the Pétan region and there were also images of Tecal itself which is an ancient Mayan ruin.

Q. Costa Rica with respect to remoteness and difficulty to gain access, were there photographs within the [264] 310 that were from Costa Rica and were remote areas?

A. Costa Rica, no, I don't believe in terms of remoteness, not really, no.

Q. In your career as a journalist of more than ten years, eleven years, what was the area that you spent the most time in?

A. Central America has been, remains today, the area that I know best and that I lived in the longest. It's also the area that I felt most attachment to in terms of understanding the

people, I think, speaking their language very fluently, following the events and turmoil that they lived through when these conflicts were going on.

Since then I've been to the Persian Gulf, I was there for only a very finite period of time and now I'm living in Moscow, in Russia and it's a whole different reality, a whole different place to get to know. But I still feel, I'll never, I don't think I'll ever—part of me will always feel for Central America because of the time I spent there.

Q. Where was your best work done to date as a photojournalist?

A. I believe it was in Central America.

Q. You mentioned—

THE COURT: If he mentioned it we heard it.

MR. J. ABADY: I apologize, Judge.

[265] Q. What is the difference between the several thousand outtakes that are still in existence and the select images? Can you explain to the jury—

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Do you have any slides, are there any slides left from Central America?

A. Yes, there are.

Q. Approximately how many images are there?

A. Over 4,000.

Q. What is the difference between those images and the select images?

MR. MONTBACH: Objection.

THE COURT: I think he's answered that already, hasn't he?

MR. J. ABADY: I don't think so, Judge, with the level of detail.

THE COURT: Overruled, let him answer.

Q. Can you explain to the jury what it takes to get that image?

MR. MONTBACH: Objection, that's a different question, your Honor.

THE COURT: Sustained.

MR. S. ABADY: Have the reporter read back the prior question.

[266] THE COURT: No readbacks.

Q. Could you explain the difference between those images and the 310 lost by the defendant?

A. The ones that are still in existence are what are called outtakes.

THE COURT: This has all been explained before lunch. He picked the best 310 of the Central American materials. That's what he said. Didn't he say that?

MR. MONTBACH: He picked the best 300, he said. He did no pick 310.

A. The 10 extra were provided by my mother.

MR. MONTBACH:There's no testimony to that.

THE COURT: I thought that had been testified to also. The jury's recollection of what's been gone over will control.

MR. J. ABADY: I'm confused now as to whether he's going to be permitted to complete the answer or not.

THE COURT: Frame a new question. He told us these were outtakes. The jury understood him I'm sure. Please don't replicate material already presented.

MR. J. ABADY: I think that's going to be issue.

THE COURT: I think some day we're going to finish this trial.

MR. J. ABADY: I think we will, Judge.

THE COURT: Please frame the next question.

[267] Q. What would you have done with the 310 images, what were your plans in terms of using them over the course of your life if you still had them, what would you be doing with them?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. I had many thoughts about what I would do with them.

THE COURT: Plans, not thoughts.

A. Plans. I had many plans. After the edit that I did, I selected the best in terms of the composition of the slide, in terms of the color, in terms of the images conveyed, etc. I had planned to write a book and sum up all of my experiences in Central America using the slides to illustrate.

I felt, my original goal of going to Central America had been partially fulfilled by the Guidance video and by the other uses to which those images and some other images had been put but I felt it was important to convey again to the American public to have a fuller understanding of the region and once I was through with the book, I would have put them in a stock agency. And I have no doubt that they would have had use value long into the future.

Q. Aside from writing—can you clarify what kind of book it was that you were going to, that you planned to [268] use those slides for?

A. A retrospective on my experiences in Central America. I had thought of writing an anecdotal book. I knew there were a lot of books on the market that dealt with political questions, economic questions, why there was poverty, that kind of thing. I thought the people who had followed the news events throughout the 1980s would be very interested in knowing the anecdotal kind of things that happened, the experiences that I lived through and to do that I would obviously want to illustrate in a very detailed way using the images to say this is what this region is all about, this is what I saw through my own eyes and lenses, and this is what I want to convey to you, people who have never had a chance to go to the region or fully understand it.

Q. In addition to writing the book and placing the images in stock houses, what were other plans that you had with respect to how you were going to market these slides?

MR. MONTBACH: Objection, leading.

THE COURT: It is leading.

Q. What other plans did you have with respect to the slides?

MR. MONTBACH: Objection, leading.

THE COURT: Well, if he had other plans he can tell us.

[269] A. I had plans to market them for CD ROM use, in the burgeoning world of computers. And there is really no limit to the uses that they could have been put to I don't think. Different kinds of technologies that now exist that didn't eleven years ago when I started to take the pictures then.

Q. What does it mean to your career, Bill, that you no longer have the 310 slides?

MR. MONTBACH: Objection.

THE COURT: If he understands the question he can answer it.

A. I find it difficult to state actually what it means. I approached the project from the beginning thinking well I knew my time in the region was coming to a close. I thought this would be an initial use that the slides could be put to. I thought it was a very worthwhile project, create the video, have it available to students throughout the country. But it was only first step, it was only to lead on to other things.

I think of all the places that I have lived and worked in my career, Central America is the one that still means the most to me and to have lost the best images that I took over a long period of time is a devastating kind of blow. And it can affect me long into the future. And again, I find it hard to express exactly how I felt about it at the time and I still feel about it today.

[270] Q. Is it possible for you to return to the region and take images and replace what you lost?

A. I don't believe so, no. Partly because the situation has changed dramatically from the time that I lived there. Obviously the slides that portray the drama, the war, the conflicts are historical and circumstances that probably will not be repeated, at least in my lifetime.

It's hard to say but I don't, even if the conflicts were to begin again or there were to be a new phase of the turmoil that has plagued the region for a long time, I don't know, I'm reaching a stage where I'm unwilling to take the same kind of risks that I did ten years ago. I don't particularly like being under fire. That's why I tried since I've been in the Eastern European region to avoid going to cover the conflict in Bosnia because I don't find it a very appealing prospect to go into war zones again.

I think you take one risk too many, and you're gone. And I doubt that I will want to become a war correspondent. I'm reaching an age, too, where ultimately I want to come back to the United States to settle. I have plans to use these images in the future for other purposes and also to go back to all these places in remote regions that I've been to. You can never recreate what you've already created.

[271] MR. J. ABADY: Judge, one moment, please?

(Pause)

MR. J. ABADY: I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Gasperini, you testified you went to—

THE COURT: Whatever he testified—

Q. You started your career—

THE COURT: You're not going to have any more stuff like that that repeats. Rule 403. Frame a simple question, something important.

Q. You started taking pictures in 1984 in Central America, correct?

A. Correct.

Q. Did you start selling your pictures in 1984?

A. I believe the first sale was to In These Times in that year, yes.

Q. How much did you earn in 1984 from the sale of your photographs?

A. Just a couple of hundred dollars.

Q. And were you selling your photographs in 1985?

A. There were occasional sales in 1985, yes.

Q. And how much did you earn from the sale of your photographs in 1985?

[272] A. Again, it was just a couple of hundred dollars.

Q. And this was at $50 or so, maybe a little bit more, per photograph?

A. Yes.

Q. Are those photographs shown in the two exhibits that have been marked I think it was 17A and B, the two loose-leaf—

A. Yes, some of them are accompanying the articles that I sent into In These Times. There are also two in the Winnipeg Free Press in Canada. Those I can recall right now.

Q. The ones that were in In These Times, did you ever have anyone request the use of those photographs again from 1984 on?

A. No.

Q. The ones that were in the Winnipeg Free Press, did you ever have anyone ask to use those photographs again from 1984 on through the present time?

A. One of those photographs was also used in In These Times. And one of the photographs Reuter's had a look at it. They were considering using it but they did not.

Q. And you say In These Times used one of the photographs that was used in the Winnipeg Free Press?

A. I can't remember who used it first but it was one or the other.

[273] Q. And each of them paid about $50 one-time use?

A. Yes.

Q. And those photographs, do you still have them now?

A. Yes.

Q. They're in the 4700 you have at home or they're here, right?

A. Yes.

Q. Did you ever market those in any way?

A. No. I made the choice not to have them put into a stock agency at that time. In the mid 80s when I began, I would offer the photographs to a particular publication that would request them or particularly in the case of the Atlantic coast or some of the remote regions I had gone to, if they felt they didn't have access to photographs of that region or that particular event, then I would offer it to them.

THE COURT: Your answer is no. When you can truthfully answer no, limit your answer to no and not anything else.

Q. How did you come to, in a typical situation for these newspapers that you were writing for, you were doing radio journalism at the same time, correct?

A. Yes.

Q. When you're writing for newspapers, was that **[274]** because you were employed by the newspaper or were you a freelancer submitting proposals to them?

A. In the beginning I was a freelancer. I would offer stories to them or they would contact me or they would say, they would say we're interested in this topic.

Q. And would they ask you, when they asked you about the topic, to go out and take pictures of that topic?

A. In the case of In These Times, yes. On occasion when I went to areas they said can you get photos to go with the story and I would say yes.

Q. Didn't you testify during your deposition, sir, that you would say to them, I have some photos, are you interested in them?

A. That would happen on occasion and there were times with In These Times when they would ask.

Q. And any of the photographs that you supplied to In These Times, were they included in the photographs that were given to Guidance Associates?

A. There were several that were from the return to the river, the Mosquito Indians.

Q. That return to the river, you said you went there with another journalist, is that correct?

A. That's correct.

Q. Was that a photojournalist?

A. That's correct.

[275] Q. Who was that?

A. His name was James Nachtway. At the time he was on contract with National Geographic to do a story about Nicaragua in general.

Q. Did he ever do that story about Nicaragua in general?

A. He did.

Q. Did you ever see that story about Nicaragua in general?

A. I did.

Q. He's a professional photojournalist, is that correct?

A. He is.

THE COURT: Asked and answered.

Q. I show you a copy of this November 1985 National Geographic.

MR. S. ABADY: May we see it, your Honor?

Q. And I ask you to look through it and tell us if those are the photographs taken by James Nachtway when he was with you?

A. There are two there of the Atlantic coast. One of them was taken when I was with him. The other is taken by the man who wrote the article.

Q. Are these photographs taken while you were with Mr. Nachtway or when Mr. Nachtway was the same place as you [276] were?

A. As I said, there's one photograph in here that was taken when I was with him.

Q. Which photograph is that?

A. The others were taken over the months that he was spending in the country in general.

Q. Which photograph was taken when you were with him?

A. This one.

Q. Referring to the photograph of a fisherman?

A. Possibly this one too.

Q. Were you with him when that picture—

A. That was taken by Mr. Edwards. But I took a similar picture in the same place. It's the ruins in the church in Waspam.

Q. The similar picture that you took, was that among the pictures that were given to Guidance Associates?

A. I believe—no, I don't believe so, no.

MR. MONTBACH: I would ask this be admitted in evidence, your Honor.

THE COURT: Received no objection.

(Defendant's Exhibit Q for identification was received in evidence)

Q. Nachtway was with you on the return to the river trip?

[277] MR. S. ABADY: Objection, asked and answered.

A. He was with me on part of that trip. I went up to the river actually twice, once with him, once by myself days later, when he had already returned to Managua and I went up by myself.

Q. In 1986, how much did you earn from the sale of pictures taken, you took in Central America?

A. I'd say it was less than $500.

Q. Around the $200 figure you had given before?

A. Roughly, yes.

Q. During those years, how much did you spend on supplies for photography each year?

MR. S. ABADY: Objection as to relevance, your Honor. How much he spent on supplies?

THE COURT: For all those pictures?

MR. MONTBACH: Yes.

THE COURT: I'll allow it.

A. Several hundred dollars.

Q. A year?

A. I would buy film. I had the equipment already because I had used it before and then occasionally I had to replace something that wore out because of the climatic conditions.

Q. Pay for processing?

A. Yes.

[278] Q. In 1987, how much did you earn from the sale or use of pictures you took in Central America?

A. I earned approximately $2500.

Q. And what was that made up from?

A. It was made up primarily from the use of the images in this program.

Q. You received $2,000 for the images used for 15 pictures used in that program?

A. That's right.

Q. How many pictures—you did an edit before you gave the pictures?

A. Yes.

Q. Were those your best pictures at that time?

A. Among them, yes.

Q. How many of those did you give to the video game people?

A. Approximately 40.

Q. And they used 15?

A. Correct.

Q. And did you get everything back?

A. Yes.

Q. Were any of those 40 among the ones given to Guidance Associates?

A. Yes.

Q. Were all the 40 given to Guidance Associates?

[279] A. No.

Q. How many of the 40 were given to Guidance Associates?

A. I don't recall.

Q. What has happened to the remaining number that were not given to Guidance Associates?

A. I still have them.

Q. Did you ever receive a request after the video game came out from anyone, any publishing house, any magazine, any video, any CD ROM people, to use the pictures that were found in the video game?

A. No.

Q. Did you ever put any of the pictures up until 1987 that you took with any stock house?

A. No.

Q. Did you approach anyone to use, other than the newspapers and the video game people, to sell the use of your pictures during that time period?

A. After 1987?

Q. Up through 1987.

A. No, I did not put them in a stock house.

Q. Did you market them in any other manner?

A. Apart from the CD ROM application and occasional sales to newspapers?

Q. That's right.

[280] A. No. Excuse me, I put together a slide show that was used by Horace Greeley High School. And in 1987 I also put together a series of slide shows on my trip in Asia, travels in Asia. And I received a grant to do that.

Q. The Horace Greeley High School slide show, did you charge them for that?

A. I received a grant for it.

Q. I'm talking about the Horace Greeley Central America slide show?

A. No, that was pro bono.

Q. That was a pro bono thing?

Q. Yes.

Q. When did you put that together?

A. 1986.

Q. And how long did it take you to put that together?

A. The slide show?

Q. Yes.

A. It took me a couple of days.

Q. And how many slides were in the slide show?

A. About 120.

Q. And did you go through the same editing process to provide them with your best up to that date of pictures from Central America?

A. Well, the number I had taken up to that point was **[281]** much less so the process wasn't as tedious or drawn out. I had only been in the region a couple of years.

Q. You had been in the region for approximately three and a half, four years at that time, 1984, 1985, 1986 and part of 1987?

A. No. I put the show together at the beginning or the end of 1985 and it was finished in the spring of 1986 so it was a total of about two years.

Q. But you did go through the editing process?

A. Yes.

Q. And you thought the 120 that you gave to the high school were the best of the ones available at that time?

A. I gave them duplicates of those and I thought they were the best, yes.

Q. Did you give them duplicates originally or did you give them the originals first and then subsequently give them duplicates?

A. I gave them duplicates when the teachers asked me. It started when I went to the school to give a presentation, to talk to the students. And I had to give a lecture about Central America. And then afterwards, they asked me, that was great, we loved it.

I spent a whole day at the school talking about Central America. They said we'd love to get a version of this with an audiotape so that we can use this when you're **[282]** not here. Because I only would come up once a year on average for a short vacation or whatever it was. And they said we'd love to be able to have this on hand as a teaching tool, as an

aid. And that was in fact one of the reasons how the whole idea of doing a show for Guidance Associates began.

Q. How did you come into contact with Horace Greeley High School?

THE COURT: Does that really matter?

MR. MONTBACH: I think so.

THE COURT: I don't. We have to get down to the value of the lost slides. It wouldn't matter if he met the principal on the street, he happened to live there, he went down and volunteered, somebody in the PTA met him on the street. It doesn't matter.

Q. Your mother is the secretary of the history department there—

THE COURT: No more about the Chappaqua high school. You're trying to circumvent my last ruling.

MR. MONTBACH: No, I'm not, your Honor.

THE COURT: You want them to infer that his mother got him the job. No more.

Q. Now, you gave 120 slides to the high school, is that correct?

A. Yes.

THE COURT: Asked and answered.

Q. Sir, I show you what's been marked as Defendant's Exhibit M and I ask you if these are copies of the 120 slides that were given to the high school?

A. I'd have to look through all of them.

THE COURT: No, you don't.

MR. MONTBACH: Just take a look at samples.

THE COURT: No more on the high school. Unless you're intending to offer the slides. If you're intending—

MR. MONTBACH: I'm intending to offer the slide.

THE COURT: Then you'll have to produce a slide projector.

MR. S. ABADY: We would object anyway. These are duplicates, not originals.

THE COURT: Sustained. That doesn't matter but he has no slide projector and the jury can't see it. Just put them away, would you please.

Next question.

Q. Sir, of the 120 slides which you gave to the high school and the originals of those, how many of those originals did you give to Guidance Associates?

MR. S. ABADY: Objection, he did not testify he ever gave originals to the high school. That's a mischaracterization of the testimony.

[283] THE COURT: It is a mischaracterization.

Q. If I said gave the originals to the high school I withdraw that.

THE COURT: He said they asked for copies.

MR. MONTBACH: And I said the copies. Let me rephrase the whole question, please.

Q. Sir, of the 120 slides that you, which you gave duplicates of to the high school and you had the originals in your own possession after that, correct?

A. That's correct.

Q. Did you give any of those, submit any of those to Guidance Associates?

A. Yes.

Q. How many?

A. I'd have to refresh my memory. I believe it was close to a hundred.

Q. Close to a hundred of the slides which you gave to the high school were also given to Guidance Associates?

A. I believe so, yes. Perhaps it was 80, 75. I don't recall the exact number.

MR. MONTBACH: Your Honor, will you permit me to have him check those slides.

THE COURT: No, he said he gave a hundred. That's the testimony. I would admit the slides in evidence providing they were accompanied by a device to allow the **[285]** jury to see them. But I don't think the jurors should be required to hold them up one-by-one against the window.

MR. MONTBACH: I will purchase a viewer tonight and bring it in tomorrow.

MR. S. ABADY: We would object—

THE COURT: It allows them to see the general nature of his work.

MR. S. ABADY: I think after you hear the expert testimony you may want to revisit that ruling.

THE COURT: No. If you want to do that I'll receive these copies in evidence. The jurors have to understand they're copies, they're not the originals and therefore the quality may be less.

(Defendant's Exhibit N for identification was received in evidence)

Q. Of the slides which you gave the copies of to the high school that you did not give to Guidance Associates, what have you done with those, if anything?

A. I believe I still have them in my files.

Q. Have you done anything to market them?

A. No. Not to date.

Q. Why not?

A. Because of what I said before. I made the conscious decision to amass a body of work over the time I lived in Central America. It was not feasible for me to **[286]** engage in constantly contacting a stock agency and I had limited time when I came up here from the region. I was busily involved in the process of reporting and working in Central America and I decided that I would hold the slides for later use.

Q. When later?

A. That was undetermined.

Q. In the future past today, past 1994?

A. In the future. When I come back to the United States to live. I hadn't reached a concrete decision on that. But I deliberately did not place images with the stock agency back in the 1980s.

Q. What about the late 1980s, you deliberately didn't put any stock pictures of Central America with any stock agencies?

A. Yes, that's right.

Q. And in the early 90s, 1990, 1991?

A. I did after that. During the Gulf War, a lot of the shots that I took were sent here. My brother did a preliminary edit, took them to Impact Visuals. They did the bulk of the edit.

That's an illustration of the problem that I had. I was always overseas. To do it properly I should have come back to do it. As it is, they were burdened to do it. It was of great interest to them to have images of the Gulf War [287] so they did the edit. But it's not the proper way to do it. Normally the photographer has to develop the film, has to look at it. Unless you're on a contract with a magazine where you send the roll of film and the magazine takes it from there. In my case that wasn't the case.

Q. With the Impact Visual Gulf pictures, and you've shown us two of them, how many did they, were they presented with, Impact Visuals, by your brother, how many did he submit to them?

THE COURT: We're talking about the Gulf War now?

MR. MONTBACH: Yes, with the stock house Impact Visuals.

A. I don't recall but I believe it was 50 rolls.

Q. 50 rolls of 36 shots?

A. Yes.

Q. 1500, 1800 slides?

A. Approximately.

MR. S. ABADY: That would be 1800.

A. Actually it was more like that. It was more like 75. I remember him telling me this incredible burden you've saddled on me. It was sort of unfair to him actually.

Q. Did he edit them down and then give them to Impact Visuals?

A. He gathered them together. I talked to him on the phone, explained roughly what they were and he, all he [288] did really was order the boxes. He looked through a box and he says this comes from, it seems this comes from, he couldn't tell very well. So Impact Visuals had to do the main edit.

Q. Do you know how many Impact Visuals kept of your pictures?

A. I believe they kept a couple of hundred, maybe 250, something like that.

Q. And when was this done?

A. This was done in the spring of 1991, while I was still in the Gulf. Spring or early summer, I believe.

Q. You identified two pictures that Impact Visuals was able to market for you, is that correct?

A. One of them in there they marketed, it was on the front cover of the Dallas Observer.

Q. The other one was inside the Dallas Observer?

A. No. The other one is the oil fire. There is another one that is in the Dallas Observer that they marketed along with the one on the cover. And the other one that's in there, that one, of the fire, was taken, that was actually taken in August.

Q. Impact Visuals was able to market two of your pictures from the Gulf of the 240 to the Dallas Observer, correct?

A. Yes.

[289] Q. Were they able to market any other of your pictures?

A. Yes. I believe they marketed six, seven, eight, something like that.

Q. Isn't it true they were only able to market over the three-year period between 1991 and 1993 seven of your pictures?

A. That could be, yes.

Q. Sir, I show you a document which was produced by your counsel and Impact Visuals and I ask you if you can identify those documents which I have marked as Defendant's Exhibit K.

THE COURT: Is there an open question?

MR. MONTBACH: I'm having him look at this.

A. Yes, these are the payment vouchers and statements of sales by Impact Visuals.

Q. When Impact Visuals sold one of your pictures, what percentage of their sales price would you receive?

A. Half.

Q. Isn't it true that you received 40 percent?

A. No. Right here it says total received was 170 and I received 68. That's half.

Q. That's 40 percent. Half of 170 is 85.

MR. S. ABADY: We'll stipulate the jury can do the math and that the figures speak for themselves.

[290] THE COURT: If the witness was wrong, the attorney can correct him.

Q. I don't have the number of the oil fire in this group of pictures that was marked, with the tank in the front and the burning oil well on the back, that's the one that's on the front cover of the Dallas Observer?

A. Yes.

THE COURT: Hasn't that been asked and answered.

MR. MONTBACH: I'm leading into the next question, your Honor.

THE COURT: Don't repeat things.

Q. Is that described on the invoice of November 19, 1991, as "close tank with burning oil well?"

A. Yes.

Q. How much was the Dallas Observer charged for that picture?

A. $175.

Q. How much would you receive from that $175?

A. It's not clear on this because it was, both of the images that were used. The other one was for 75, the total was 250 and I received a hundred of that.

Q. For the two pictures, one on the cover and one inside the Dallas Observer, you received one hundred dollars?

A. Yes.

[291] Q. And those pictures have never been reused, remarketed by Impact Visuals since then?

A. As far as I know, no.

Q. When was the last time you received a payment from Impact Visuals for the use of your Gulf pictures?

A. I believe it was sometime last year.

Q. What are their payment periods?

A. Every six months.

Q. Have you received a payment for the last six-month period?

A. No.

Q. Then they haven't been able to resell any of your pictures of the Gulf War for the last six months?

MR. S. ABADY: Objection, calls for speculation.

THE COURT: If he knows.

A. No.

MR. MONTBACH: I request that Exhibit K be admitted in evidence, your Honor.

MR. S. ABADY: No objection, your Honor.

THE COURT: Received without objection.

(Defendant's Exhibit K for identification was received in evidence)

Q. The picture identified here of the Gulf War, is that with Impact Visuals?

A. I believe it is. I'm not sure.

[292] Q. Has that had any sales at Impact Visuals?

A. As far as I know, no.

Q. Has it had sales anywhere else?

A. No.

Q. In 1988, how much did you earn from the sales or use of your photography?

A. I believe it was roughly $1500.

Q. Did what did that consist of?

A. Close to 2,000, actually. Between 1500 and 2,000.

Q. Was that the slide show you were talking about?

A. That was the grant and honorarium and I believe there were a couple of sales to newspapers too.

Q. A couple of sales to newspapers of what types of pictures, Asia or Central America?

A. Central America.

Q. How much did you earn in that year from Central America pictures alone?

A. I can't quantify it. I don't know. I don't recall.

Q. You received 1500 to $2,000 for the Asia grant?

A. The grant was for 1500. And then there were extra expenses for the duplicating. Of the sales of Central American images it would have been a few hundred dollars, probably.

[293] Q. And going back to 1987, the only sales, you had about $500 outside the video game and that $500 was all Central America or was that something else?

A. In what year?

Q. 1987. You told us about the $2,000 for the video game and you gave a figure of $2500. What did that other $500 consist of, what type of pictures?

A. It was a few hundred dollars and I believe it was for other sales of pictures. I think I wrote an article about Tibet

for In These Times and there were two photographs with that. And I think there were a couple of others. They were Asia pictures.

Q. Over and above the video game money the sales in 1987 were Asia pictures?

A. Yes. I spent most of the year in Asia. I wasn't in Central America that year until the very end.

Q. 1989, how much money did you earn from the sale of your photography?

A. It would have been less than $500.

Q. And how much of that would have been from the sale of photography from Central America?

A. That would have been all of it. I don't believe there were any sales of Asian pictures that year.

Q. There was no demand for your Asian pictures?

A. Not beyond what I already provided, no.

[294] Q. 1990?

A. I also did not place the Asian pictures in the stock agency as well.

Q. Why not?

A. Because I had other plans for them. I didn't feel—I hadn't established a relationship with the stock agency at that point.

Q. You have a relationship with Impact Visuals now, have you given them any of your Asian pictures?

A. No.

Q. Have you given them any of your Central American pictures?

A. No.

Q. Have you approached them to give them any of your Central American pictures?

A. No.

MR. S. ABADY: Objection. Those pictures were lost by the defendant. He can't give—

THE COURT: Objection sustained on the ground of waste of time. Don't make statements.

Q. In 1990, what were your earnings from photography, the sales or use of pictures you took?

A. Again, it would have been less than $500.

Q. Is that solely from the sale and use of Central American photography?

[295] A. Yes.

Q. In 1991, that was when you finished the video, is that correct?

A. Correct.

Q. Finished your part of the video. How much did you earn that year from the sale or use of your photography?

A. That was the year I first, I believe I received the first royalty payments from Guidance.

Q. Do you have copies—

A. And there were sales from Impact Visuals, too.

Q. Do you know today how much the first royalty payment was—

THE COURT: If there's papers just introduce the papers, because this is taking too long year by year. We're only up to 1991. Just introduce the royalty papers and read from them to the jury how much he got.

MR. S. ABADY: They've already been admitted in evidence, your Honor.

THE COURT: If they're in evidence, read the number. I don't want to waste time with this year by year interrogation. If you care, read the number and move on.

MR. MONTBACH: A complete set was not introduced in evidence, your Honor.

THE COURT: Offer the rest.

MR. S. ABADY: Those that were turned over to us **[296]** at discovery were.

THE COURT: No more discussions like that on the record. Just offer it in evidence and move along.

MR. MONTBACH: I'll mark these later on.

Q. I show you five documents and ask you if these refresh your recollection as to payments you received in connection with the royalty.

THE COURT: Offer them in evidence and read it to the jury.

MR. MONTBACH: I'd like to call those Exhibit AA.

THE COURT: Exhibit AA is received in evidence.

(Defendant's Exhibit AA for identification was received in evidence)

THE COURT: If you care about the number, read the number from the exhibit to the jury. If you don't please frame your next question in cross-examination.

Q. In October 17, 1991, were you given a check in the amount of—

THE COURT: You were told by me how to do this. You do it my way or don't.

MR. MONTBACH: I'll be happy to do it your way. October 17, 1991, $128.40. April 16, 1992, $141.07. October 15, 1992, $103.19. April 15, 1993, $71.74. October 14, 1993, $107.28.

Q. Have you received any royalties since then, sir?

[297] A. Not to my knowledge.

Q. And you received the $3500 payment?

A. Yes.

Q. In 1991, how much did you receive from the sale or use of your photography of Central America?

A. Exclusively Central America.

Q. Central America.

A. Whatever I received from Guidance that was it. Because I was already gone from Central America at that time.

Q. I understand you were gone from Central America. I asked you from the sale or use of the pictures you took in Central America?

MR. S. ABADY: Objection, he answered the question.

THE COURT: I thought he answered the question. The numbers have just been read to the jury.

Q. And you received $92 from Impact Visuals that year?
A. I believe so. I'd have to look at this to recall.
Q. Last year, how much did you earn from the sale or use of your pictures of Central America?
A. Again, just what I would have received from Guidance Associates.

[298] MR. S. ABADY: I object to the question as misleading since he doesn't have those pictures any more. He couldn't possibly get royalties from anyplace but the defendant.

THE COURT: I'm not commenting on that. I've tried to get the matters before the jury as promptly and as fairly as I can and I don't believe I'm getting the full cooperation and support that I should be getting from either attorney. Now just complete the cross examination of this witness and we'll move the trial along. And I don't want any more comments of that sort in front of the jury. Just frame the next question.

MR. MONTBACH: Yes, your Honor.

Q. Sir, you gave 300 slides to Guidance Associates, you're suing for 310 slides. How did the other 10 slides get to Guidance Associates?
A. They were given to Guidance Associates by my mother.
Q. Did you pick out those pictures?
A. No, I did not.
Q. Do you have a list of what those pictures contain, represent?
A. No, I was overseas at the time.
Q. Did your mother make a list for you—

THE COURT: She was here and testified. You [299] could have asked her if you cared.

MR. MONTBACH: She said she didn't give any pictures, your Honor.

THE COURT: Somebody gave them as I understand it.

MR. S. ABADY: Your Honor—

THE COURT: Sustained.

Q. Do you have a list of what those ten pictures consist of?

THE COURT: Asked and answered.

Q. You've given us a list in your answers to interrogatories of the 300 pictures which you gave to them. I don't want to spend a lot of time, your Honor, but I have to ask these questions.

THE COURT: Ask the next question.

Q. When you were in Nicaragua taking pictures, were there other photojournalists with you at the time you were taking the pictures?

MR. S. ABADY: Objection as to relevance.

THE COURT: It's probably relevant to show that other people have pictures of Nicaragua. Sometimes there were, sometimes there weren't. Use your common sense.

A. Exactly. Sometimes there were, sometimes there weren't. Usually there were.
Q. Usually there were?
[300] A. There were trips I took into the mountains where I was by myself or with one other person. There were other times when there were hundreds of journalists present. During the summit meetings for example.
Q. When there were pictures of all these people that were listed, the famous people, is that correct? There were dozens, as you said hundreds of journalists?
A. Only on occasion. For example, if Daniel Ortega took a press conference, there were always photographers present. That's just common sense. There were other times when I would see him as he got out of his vehicle, I remember one time early on that he went to visit a neighborhood in Managua

and I was there and there were not that many photographers present. But usually he would attract a lot of people present.

Q. You listed pictures, two of which were in the video, taken in May of 1986 of Oscar Arias. There were other photographers present there, right?

Q. You listed two pictures of Daniel Ortega taken during the summit, you said others were there, is that correct?

A. Yes.

Q. Two taken of Daniel Ortega during the historic February election campaign—

[301] MR. S. ABADY: Objection. He doesn't own the copyright to anybody else's pictures.

MR. MONTBACH: This goes to uniqueness of his pictures.

THE COURT: The witness has already told you that for many of these scenes there were other pictures taken by other photographers of the same people or the same places or the same events. He's told you that. Even if he did not tell you that, their common sense would tell them that. The jurors would know that.

Why must we have this inch-by-inch demonstration of what is obvious. If there's a list of the pictures and you want to introduce the list of the pictures in evidence, the jurors can determine how likely it is that similar pictures exist or don't exist.

MR. MONTBACH: I don't know if that's true, your Honor. I think I have a right to ask him this question.

THE COURT: I think I have a right to tell you not to. Waste of time.

MR. MONTBACH: Your Honor, I respectfully—

THE COURT: Just a waste of time. If you want to introduce the list of the pictures you can certainly do that.

MR. MONTBACH: I do not want to introduce the list of the pictures, your Honor.

[302] THE COURT: All right.

Q. When you were on the Witness for Peace trip, I'll limit it to a few places, your Honor, how many other photographers were there?

THE COURT: I made a ruling. I'm going to adhere to my ruling.

MR. MONTBACH: Oh, your Honor.

THE COURT: That's right.

MR. MONTBACH: I respectfully except, your Honor.

THE COURT: You have an exception.

Q. In the years while your slides were being stored up until today's date, up until the time that the loss occurred, excuse me, did you ever have anyone give you an appraisal of the value of those slides?

A. No.

Q. Now this book that you testified you would like to write eventually, have you started it?

A. No.

Q. How many pictures were you going to use in the book?

A. That would be determined by the projected length.

Q. Have you approached anyone about publishing it?

A. No.

Q. Have you done any marketing research to find out if there would be any demand for this book?

[303] A. No.

Q. Is there any reason why you can't use any of the 4700 remaining photos you have in that book?

A. They are not the kind of pictures that are salable in the long run. They're outtakes. I would not consider them to be of top quality that I would want to have in a book.

Q. When you take a picture, when you took pictures down in Central America of a particular scene, would you take only one picture of that scene?

A. No. I frequently would take many pictures.

Q. And those are in the outtakes?

A. Yes.

Q. And there are other photojournalists by you taking pictures at the same time?

A. Frequently, yes. The thing about taking a top quality picture, a lot of elements have to come together, the composition, the color, the lighting, the subject matter, the point of view, the angle, the lens you're using. You could take a whole roll and only one or two out of the whole roll are really worth publishing. That's why you have to take a large volume, that's why I have thousands of slides that are outtakes.

Q. Have you had anyone look at those outtakes to determine whether they can be used for any purpose, not just [304] your book but for any purpose on the market of slides?

A. Any outside agent?

Q. Outside agent, stock agency, anyone?

A. No, I haven't.

Q. Do you advertise yourself as a photojournalist?

A. I call myself a journalist.

Q. Have you ever taken any advertisements to sell any of your pictures?

A. Public advertisement? No.

Q. Have you ever shown your pictures taken from 1984 on in Central America at any galleries?

A. Yes.

Q. When?

A. I had four pictures that were exhibited in 1984 at a special exhibition in San Francisco.

Q. Since then have any of your pictures ever been in a gallery showing?

A. No.

Q. Do you have an agent for the sale of your pictures?

A. Apart from Impact Visuals for the Gulf War slides, no.

Q. Are you a member of any photographic organizations, professional photographers organizations?

A. No.

[305] Q. What professional organizations are you a member of?

MR. S. ABADY: Objection, your Honor. How is it relevant if he's not a member.

THE COURT: I suppose he means having to do with his work.

Q. With regard to your work, certainly.

A. In Nicaragua I was a member of the Foreign Press Association. It was a club, we called it an international press club. Currently in Russia I'm a member of, there's a press club there too but I'm like an associate member.

Q. Are you a member of the National Writers Union?

A. Yes.

Q. Have you ever taught anyone how to take photographs?

A. I have been with people whom I have given advice to on taking photographs, yes. Not taught in the formal sense, no.

Q. When you stated you learned a lot in Central America from top quality photographers who were with you, who were they?

A. James Nachtway, William Gentile, he was on contract for Newsweek through most of the 80s in Central America, Lou Damatais, who was the bureau chief for Reuter's. Those were the three that come to mind right now.

[306] Q. In These Times used your pictures. Did they also pictures from other people?

A. Yes.

Q. Did they use them to illustrate your stories?

A. On occasion, yes.

Q. What about Christian Science Monitor?

A. Yes.

Q. Did they ever use your pictures?

A. Yes.

Q. Of Central America?

A. No. Not to my knowledge.

Q. Did they use other pictures to illustrate your stories?

A. Christian Science Monitor is somewhat unique that they, unless absolutely necessary, they use pictures that have been taken by their own staff photographers who they send periodically to gather stock for their own use.

Q. Did they have staff photographers in Central America at the time you were there?

A. They had people who came through on occasion but they never maintained anyone there and occasionally they would pick up a wire picture when they didn't have a stock picture in stock, from one of the agencies.

Q. Has anyone ever approached you to write a retrospective of your experiences in Central America?

[307] A. There have been many people who have encouraged me to write a book. Often when I tell stories of what I went through they say that's fascinating, that's something I hadn't heard before. You should write a book. I heard that. Even today I hear that.

Q. Anyone in the publishing industry?

A. There are people that I do know—well, no one who was suggested formally that I write a book. But people who have said that sounds like a great book idea.

Q. You have your slides at Impact Visuals. Are you a member of Impact Visual or just a contributor?

A. Contributor.

Q. Is there a difference between a member and a contributor?

A. Yes.

Q. What is the difference?

A. A contributor is someone who sends in material and they market it for you. A member is a more formal kind of a thing where you are a formal member, you are like on a contract with them, not a contract, but you're a part of their network.

Q. And isn't it true that a member gets a 50 percent share of the sale of their goods rather than 40 percent?

A. That's true, yes.

Q. Why didn't you become a member?

[308] A. Because I was living overseas. To become a member you have to put together an extensive portfolio and go through a fairly long process of discussing. I'm still at a stage where I don't feel that I can actively contribute to a stock agency on a regular basis and to do that, become a member, I would have had to have done an edit of everything I've done to date and gone through that process. And I'm only in the United States for a few weeks each year. I'm overseas all the time and it's difficult from a distance to change that kind of relationship.

Q. Isn't it true that most print journalists carry a camera with them and radio journalists when they're covering topics overseas?

A. I wouldn't say that most do, no.

Q. A good number of them do?

A. Some do. Particularly when they're going to an area where they're going to do a feature story for example. You'll see sometimes in the New York Times a story about a village and the same person who wrote the story has also taken the picture.

Q. Mr. Nachtway was a war correspondent, wasn't he?

THE COURT: Asked and answered. We've had that. Frame another question.

MR. MONTBACH: Your Honor, I would like to offer into evidence a copy of the November 1983—wrong one, your [309] Honor. I have no further questions, your Honor.

THE COURT: Any redirect examination of this witness?

MR. S. ABADY: Very briefly, Judge.

REDIRECT EXAMINATION

BY MR. S. ABADY:

Q. Bill, I'm going to show you what I've just marked as Plaintiff's Exhibit 31 and ask you if that is a list of the 310 photographs that you previously provided to counsel for the defendant in your sworn interrogatories.

THE COURT: I think the question would be whether this is a list of the missing photographs.

MR. S. ABADY: That was my next question, your Honor.

A. Yes, it is.
Q. Is the list of the 310 missing photographs?
A. It's—yes.

MR. S. ABADY: I move it into evidence, your

MR. MONTBACH: Your Honor, I object to the characterization. It doesn't describe the 10 other ones.

THE COURT: It's a list of 300 out of the 310.

A. There's an explanation at the end for the additional 10.

THE COURT: It will be received in evidence. Not [310] to be handed in with any extraneous paper.

MR. S. ABADY: There is none, Judge.

(Plaintiff's Exhibit 31 for identification was received in evidence)

MR. S. ABADY: At the very bottom of the last page there is a description which corresponds to description of the Nikon cameras he used to take the pictures.

THE COURT: If there's no objection to it, I'll take it.

MR. MONTBACH: No objection. He's already testified to that.

Q. Bill, how many rolls of film did James Nachtway shoot to get the few pictures that were published in National Geographic?

MR. MONTBACH: Objection.

THE COURT: Sustained.

MR. S. ABADY: No further questions.

THE COURT: All right. Please step down.

(Witness excused)

THE COURT: We'll take a brief recess at this time, ladies and gentlemen. Everyone please return in about ten minutes.

(Recess)

(Jury present)

THE COURT: Call the next witness, please.

[311] MR. S. ABADY: The plaintiff calls William Kuebler to the witness stand.

WILLIAM KUEBLER, called as a witness by the plaintiff having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. Where do you reside Mr. Kuebler?
A. Chappaqua, New York.
Q. How old are you, sir?
A. I am 40.
Q. What is your educational background, please?
A. I have a BA in journalism from Pace University in White Plains.
Q. Would you please describe for the ladies and gentlemen of the jury your employment history?
A. I've been a photographer for 15 years, I originally started out at the Patent Trader newspaper in Mt. Kisco. I was there for five years, became a chief photographer, then I moved on to Gannett where I was a photographer for seven years and I'm presently the photo editor nights for Gannett.
Q. You've been working for Gannett since 1984?
A. Yes, I have.
Q. How many photographers do you oversee?
[312] A. We have a staff of 16 photographers.
Q. And what newspapers are the photos that you take or edit published in?

A. Mostly our photographs are in Gannett suburban newspapers, that's 13 newspapers in our chain. We're part of Gannett which has 33 newspapers including USA Today.

Q. How many photographers does Gannett employ?

A. I would guess over a thousand.

Q. And have you or any of your photographers, when I say yours those that work under you, won awards?

A. Yes, our staff is very proficient at winning awards. We won awards with the National Press Photographers Association, New York Press Photographers Association, Associated Press as well as Gannett corporate awards and our local Gannett suburban newspaper awards.

Q. Mr. Kuebler, have you won any awards for your photography?

A. Yes, I have. I've won awards local with Gannett, I one won corporate award and a National Press Photographers Association award.

Q. Where have your photographs been published?

A. My photographs have been in Sports Illustrated, USA Today, Next Magazine, Women's Day, a couple of books and I think that's about it.

Q. And in your capacity as the Gannett photo editor, [313] do you obtain slide transparencies from outside providers or agencies such as stock agencies?

A. Yes, we do.

Q. How are they handled?

A. Usually they're kept under lock and key.

Q. Why is that, sir?

A. Because they cost a lot of money to replace them. And my bosses are very specific about what we do with them.

Q. How much money do they cost to replace?

MR. MONTBACH: Objection, your Honor.

THE COURT: Overruled.

A. $1500 was the last one I worked with.

Q. Is that the industry standard for a lost or damaged slide?

MR. MONTBACH: Objection.

THE COURT: If he knows. I'll take it subject to cross examination.

A. It's the industry minimum.

Q. Industry minimum. How long have you been aware of that industry minimum?

A. Probably about 15 years when I first started.

Q. From what sources did you learn the industry minimum?

A. When I first started out there was a book called The Photographers Marketplace which was a basic bible for [314] photographers and also The Photographers Handbook which had the information in it and I assume from articles over the years.

Q. Are there books for persons such as yourself who is a consumer or user of stock photographic stock about obtaining stock photography?

A. Yes. There are several.

Q. Give me some examples?

A. The one that we use mostly in our office is the Photographers Buyers Guide which is a basic guide to purchasing stock photographs, depending on how you use them, one-time rights, how large you're going to use them.

Q. And there's the industry standard discussed in that work?

A. Yes, it is.

Q. Do you know Bill Gasperini, the plaintiff in this action?

A. Yes, I do.

Q. How do you know Bill?

A. Bill is a professional colleague of mine and a friend.

Q. How long have you known him?

A. About 25 years.

Q. How long have the two of you been doing photography together?

[315] A. I believe we started out in high school together, taking year book photographs.

Q. Are you familiar with Bill's work as a photographer?

A. Yes, I am.

Q. How many other photographer's works are you familiar with?

A. Hundreds personally that I've worked with over the years.

Q. I'm showing you collectively, Mr. Kuebler, what's been identified as Plaintiff's Exhibit 18. Have you seen any of these pictures before?

A. I've seen this one. It's hard to remember specifically. The Gulf War, yes. Bill has a large volume of work. I've seen this group.

Q. And of the photographs that you've seen taken by Bill Gasperini, how do those particular photographs, Exhibit 18, compare to the award-winning photographs of other photographers or others in the Gannett organization?

A. These are all wonderful photographs. Their composition is excellent, their lighting is very good, subject matter is gripping. They are every bit as good, if not better, than the photographs that we've taken.

Q. How does Bill Gasparini's work as a photojournalist compare generally to the photojournalists **[316]** whose work you edit on a daily basis?

A. Bill is an excellent photographer. His technical skills are great. His composition as I said before is wonderful. But more so I think it's his access to areas which is very important. He gets places where no one else goes, where our staff couldn't get.

Q. Such as?

A. His contacts have gotten him into Panama during the invasion, to the Gulf War onto the ships.

Q. Regarding the U.S. invasion of Panama, was there a press blackout?

A. Yes, I believe there was.

Q. Was it difficult for newspaper men such as yourself to get photographs from that invasion?

A. I've got to admit we did not try to send anyone to that because we're local, but I imagine it would have been quite—

MR. MONTBACH: Objection, your Honor.

THE COURT: Strike out what he imagines.

MR. S. ABADY: I have no further questions of Mr. Kuebler.

THE COURT: Counsel may cross-examine.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Mr. Kuebler, you said you've known **[317]** Mr. Gasperini—

THE COURT: Asked and answered. We had that. We heard it.

Q. Has any of your newspapers that you cover ever used any of Mr. Gasparini's pictures?

A. Yes, I believe we have.

Q. When?

A. Several years ago Bill was with a number of other journalists down in Nicaragua when they were captured by rebels and Bill came back and wrote a story for us and supplied photographs.

Q. I've seen the story, sir. Do you have the picture?

THE COURT: Just frame a question.

A. Do I have a picture?

Q. Yes.

A. No.

Q. Do you know when that was published?

A. That was before my time editing.

MR. MONTBACH: Counsel, was that produced with the pictures?

THE COURT: No discussion in front of the jury.

MR. MONTBACH: No further questions.

THE COURT: Any redirect?

MR. S. ABADY: Two questions, Judge.

[318] REDIRECT EXAMINATION

BY MR. S. ABADY:

Q. Mr. Kuebler, are you compensated for your testimony here today?

A. No.

Q. On what basis—

MR. MONTBACH: Objection, that's not—

THE COURT: Sustained. Not proper redirect.

Q. On what basis were you compelled to arrive here today?

MR. MONTBACH: Objection.

THE COURT: On what basis was he compelled what?

Q. Were you subpoenaed—

THE COURT: How can you subpoena an expert witness. Is he an expert witness?

MR. S. ABADY: He's offered as a fact witness as well as an expert witness, your Honor.

THE COURT: Strike it out. The jury doesn't care why he's here.

MR. S. ABADY: Fine. No further questions.

THE COURT: The court will note that counsel for the defendant was standing intending to object. Thank you, very much, you're excused.

(Witness excused)

MR. S. ABADY: Next, your Honor, the plaintiff [319] calls the expert witness, Ms. Jane Kinne.

MR. MONTBACH: I thought we had an expert witness.

MR. S. ABADY: He was listed as a fact witness. I don't know that we need to have this colloquy in the presence of the jury.

JANE KINNE, called as a witness by the plaintiff having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. S. ABADY:

Q. How old are you, Ms. Kinne?

A. I'm 69.

Q. Could you kindly tell the ladies and gentlemen of the jury your educational background?

A. I hold a bachelor's degree from the College of William and Mary in American history, a master's degree in audiovisual education from Columbia University.

Q. And when did you obtain your master's from Columbia?

A. In 1950.

Q. And did you pursue any postgraduate education?

A. I have taken a course in photography and the law through New York University, I have done some work in layout and design through Bridgeport University.

[320] Q. Could you describe for the ladies and gentlemen of the jury your professional career?

A. Well, it's 47 years in the photo industry starting with being the film librarian for Colonial Williamsburg which involved the maintenance of a file which was run as a stock file available on loan to various publications. I did that for two years.

I then went to New York to get my master's degree and while I was doing that, I was approached by the National Audubon Society to come and solve some problems they had with what they called their photo and film department. In effect, it was very much like the Audubon file, a collection of photography on natural history and the environment and then in 1950 they were trying to encourage use of pictures on envi-

ronmental issues and they asked if I would run that, which I did for seven years as a photo agency.

At that point I left Audubon and went to Photo Researchers Inc. which was a large agency in New York City almost entirely at that point in time in editorial photography. I was there for 30 years, the last twelve of which I served as president of the organization.

At that point I thought I was retiring but I was persuaded by Henry Scanlan of Comstock to come to Comstock and help build a stronger editorial department for that agency which was largely devoted to advertising and [321] commercial photography. I did that and did so for six years and when it was finally up and running, succeeded on April 1, 1993 in retiring.

I have since been a photo consultant for individual photographers handling some affairs for the various professional organizations, particularly in the legal area, and as the advisor and consultant to National Geographic's new photo agency.

Q. What is the Picture Agency Council of America?

A. It's a trade organization composed of at the present time 101 stock photo agencies throughout the United States and Canada.

Q. I'll show you what's been previously marked and admitted in evidence as Plaintiff's Exhibit 27.

MR. MONTBACH: That was not admitted in evidence.

MR. S. ABADY: If I misspoke, Judge, I apologize.

THE COURT: The clerk's minutes are the controlling record.

THE CLERK: I don't have it in, Judge.

Q. I show you what's been marked but not admitted as Plaintiff's Exhibit 27. Could you identify that for the ladies and gentlemen of the jury?

A. That is the most current directory of members of the Picture Agency Council of America.

Q. And what is your position with the PACA?

[322] A. At the present time, I am a honorary lifetime member and chairman of their legal committee.

Q. Have you held any previous positions?

A. Yes, I served two separate terms as president of this organization.

MR. S. ABADY: I would offer the document in evidence, your Honor.

MR. MONTBACH: Objection.

THE COURT: I'll sustain it on the ground of relevance. There's no showing that either the plaintiff or the defendant are members of it. I think the ruling is no proper foundation.

MR. S. ABADY: I'll lay a proper foundation later if I may, Judge.

Q. Did you ever serve on the executive committee of that organization?

A. Yes, I did. For a number of terms.

Q. What was your title?

A. I was chairman of the executive committee for a period of I believe six years.

Q. And what is the American Society of Picture Professionals?

A. It is a professional organization composed of various members of the photographic community. It is partly photographers, partly agents, partly librarians and art [323] directors from publishing houses and ad agencies.

Q. Have you ever served in that organization?

A. Yes, I have. I served one term as their national president and also served as the chairman of their legal committee.

Q. And have you ever been a speaker at seminars or panels given by that organization?

A. Yes. Almost on an annual basis.

Q. And Ms. Kinne, what is the American Society of Magazine Photographers?

A. It is a trade organization of photographers now known as the American Society of Media Photographers in recognition of the new uses of photography.

Q. And what has been your position with that organization?

A. I have been a sustaining member of that organization for it's almost 30 years now.

Q. Does that organization publish any kind of I business guide?

A. It publishes a business guide or Guide to Business Practices as it was called before. It's been through four editions that I'm aware of.

Q. And what are those editions?

A. Well, there was the original one in 1973 up through the last one which was in 1984.

[324] Q. What kind of information is contained in the ASMP guide?

A. It is all of the definitions and descriptions of the way photography is handled, not only by the photographers but by their agents and by the various people who borrow photography for the purposes of reproduction.

Q. When you say borrow photography, could you elaborate on that for the jury?

A. Well, by in large in the photographic world the photographer agent does not outright sell a transparency. What they are doing is using the framework of the copyright law that allows you to grant right to individuals or organizations to make a specific use of the photograph. And the user is limited to that specific use, the fee is structured to reflect the specific use, and after the usage the item returns to either the photographer or agent, and additional rights could be granted to many other parties or even that same right after a certain length of time could be granted again?

Q. What is a Photo Expo?

A. It's a big trade show that is encompassing the entire photo world including the manufacturers of photographic equipment.

Q. Have you ever been a panelist or speaker of Photo Expo?

[325] A. I have since its inception in 1983. It is an annual event in New York and a biannual event in the midwest and west coast.

Q. What is the International Photographic Congress?

A. It is a large meeting of a cross-section of people who participate in the photographic community. Photographers, users of photography, manufacturers, writers, lecturers in the field, and the Congress evolved at the Maine Photographic Workshop as the only international meeting in the United States involving all these people.

Q. You say Maine, you mean the state of Maine?

A. State of Maine in Rockport, Maine.

Q. Have you ever attended any of these?

A. I have.

Q. In what capacity?

A. I have a been a panelist in every year but one since its inception.

Q. Have you have ever been asked to appraise photography?

A. Yes, I've done appraisals for the estates of photographers for tax purposes. I've also done it for universities and museums and received great gifts of photography and I've done it for Sotheby's gallery in regard to their own photography.

Q. Have you ever been previously qualified as an [326] expert witness in the evaluation of original photographic transparencies?

A. Yes, I have.

Q. On how many occasions?

A. I've never actually counted this as an exercise in accuracy but it's somewhere in the vicinity of 70 cases.

Q. Ms. Kinne, have you had occasion to examine the work of Bill Gasperini?

A. Yes, I have.

Q. Would you tell the ladies and gentlemen of the jury—

MR. S. ABADY: In fact, excuse me one second. Could I have Exhibit 18.

Q. I show you a representative example of his work, Exhibit 18, collectively 18A through 18L. Have you seen these pictures before?

A. Yes, I've seen both the prints and the transparencies from which the prints were made.

Q. Are those representative samples of the ability of Bill Gasperini as a photojournalist?

MR. MONTBACH: Objection.

THE COURT: If she knows.

Q. In your expert opinion.

MR. S. ABADY: By the way, at this time I would offer Ms. Kinne as our expert witness.

[327] THE COURT: It's a question for the jury. The jury can consider her experience and her knowledge and determine whether they accept her professional opinion.

Q. Based on your professional opinion, Ms. Kinne, what is your opinion, do you have an opinion as to whether or not Plaintiff's Exhibit 18A through L is or is not emblematic of William Gasparini's ability as a photographer?

A. I feel that these are a good representation of the types of things that Mr. Gasperini does, based not only on the transparencies I viewed but the conversations I have had with him.

Q. Did you interview Mr. Gasperini?

A. I have done so on two occasions.

Q. And interview him specifically regarding the circumstances under which he took photographs?

A. That was one of the areas I was interested in. His habits in editing was another area that interested me.

Q. What is your opinion of the quality of Mr. Gasparini's work?

A. I think he is a first class professional photo journalist.

Q. Ms. Kinne, explain to the ladies and gentlemen of the jury how is a photograph made?

A. Well, there's a great deal that goes into it both before and after you actually raise the camera to your eye. [328] You have to have background information if you are doing this as a professional. You have to know your subject area. You have to understand the importance of the relative features of that area and you have to understand a great deal about how to go about getting access to that.

Then you go through the business of selecting your equipment the type of film that you will use for a particular job. Often times a photojournalist is very restricted because he must carry on his person everything he's going to use for the job as compared to a location photographer who may have a whole group of people helping him and a vehicle from which he can draw additional cameras, lenses or film.

A photojournalist has it all very often on his back. Then he has to survey what is available to him with the knowledge, the important thing here is the mind that's behind the eye that's going to be behind the camera. And he then selects the things that tell the story, give the relative importance to the story, tries very hard to round out that story, then he goes to the technical side of photography which is what about my light here, what can I do, what can't I do, how much action is involved in what I'm trying to record.

And then finally he goes to the aesthetics as much as the situation will allow to try and get the most [329] impact into his graphics.

Q. Does the knowledge of a region, that its history and culture, and the knowledge of the language of the region, bear on the ability of a photojournalist?

A. It's primary. Anyone can perhaps force their way into a situation but if they haven't done their homework or don't have all that background and the language skills in order to either let it be known what they are doing or to understand what is going on between the participants, what they record is sometimes meaningless and often times mediocre at best.

Q. Once an image is recorded on film and the film is processed and you have an original image, if it is lost it is replaceable?

A. If we are talking about color transparencies, if that original is lost everything is gone for all time.

Q. Can you explain why that is to the ladies and gentlemen of the jury?

A. Well, in the case of color film, the chemicals are on the film that goes through the camera and is exposed. That piece of film goes through a process that develops it on the same piece of film upon which it was exposed. There is no negative as there is in black and white. The positive color transparency is both the negative and the positive.

Q. Is a duplicate made of a color transparency or a [330] slide not the same as an original?

A. No, it is not the same as an original.

Q. Could you explain.

A. Duplicates being one generation removed suffer losses in focus sometimes, in saturation. They just do not have the same color quality that the original does. You can, depending on how much money you're willing to expend, come close. But it is indeed not the original.

Q. In the industry, and I mean both the advertising and editorial side of the industry, is it typical that duplicates will be accepted by lieu of originals?

A. Users like original photography. They have learned that the only thing they will get from catalog prints are duplicates but the rest of the industry still operates on originals.

Q. Is there, Ms. Kinne—strike that. What is involved in the process of editing a body or related group of work?

A. Editing is as much a skill as taking the picture. That was why I was terribly concerned about Bill Gasperini's edit experience and how he went about it. You have to take an entire group of things and spread them out in front of you. You can quickly get rid of the things that have obvious technical faults. You left the lens cap on. Somebody walked right in front of you at that final moment. [331] Somehow or other

somebody in the scene turned their back. Those things you have no control over.

Then comes the business of looking at the whole, going frame by frame with what we call an engraving glass or loop, where you look at each one with this magnifier that is color corrected and optically correct, just like the lens of the camera. And you look for the refined details of the technical part of it. You get rid of everything that does not come across as first class.

Then you go back and look for the story that you were trying to tell and you get rid of anything that really isn't contributing to that story line. And then finally you select within the story those things that have the greatest impact graphically or aesthetically.

Q. Light has an impact on the quality of a picture I take it.

A. There are many of us who think that light is the essential part of it.

Q. Are there other things, temperature, humidity, things like the weather that can affect the photograph?

A. If we're talking about at the time of the taking of the photograph, of course. If the weather is going to be bad all day as we have been having you have no choice, you have to go ahead. So you have to select your material in a way that the weather works for you, not against you. In [332] other words, you go for the moody look and so on.

The temperature, of course, affects how much activity is going to go on in a scene. We all know about the fact that none of us are as active when we're really feeling the temperature as other times.

Q. Ms. Kinne, could you tell the ladies and gentlemen of the jury is there an industry standard for a damaged or lost color slide transparency?

MR. MONTBACH: Objection, your Honor.

THE COURT: She can answer.

A. Yes, there is.

Q. Would you elaborate, please?

THE COURT: No, just tell us what the standard is. Don't elaborate.

A. It's $1500 per professionally-taken and professionally-edited transparency.

Q. Are Mr. Gasperini's works as you have seen professionally taken?

A. Yes, they are.

Q. Are they professionally edited?

A. Yes.

Q. In your opinion. Could you tell the ladies and gentlemen of the jury how the industry standard was developed?

A. This goes back as far as the late 1960S. At that [333] time, a number of users of photography, several publishers and two advertising agencies, approached the American Society of Magazine Photographers with a question about what is the value of the original transparency because they felt that color was becoming wide enough in use that they ought to seek some protection by way of insurance but they had no figure to go by.

ASMP called together a group of people representing agents, photographers and users and put the question to the group. The group decided that it wasn't broad enough to answer for everybody and started to do a survey. And so we started down the path, I was part of that group, to do a survey of users, photographers and agents.

Q. Forgive me for interrupting, when you say "group," are you referring to the Committee on Valuation?

A. Yes.

Q. Please continue.

A. And we devised a group of questions about the price ranges paid for various uses on a one-time basis, the prices paid when people used a picture repeatedly, something about what a photographer and an user thought if they were buying all rights to a photograph, what would they be willing to pay. We asked about the number of times photographs were reused and questions along the lines trying to come to some kind of

a value through the information of [334] the people in the community.

When all of this was tabulated, it was several years later because it was just precomputer, and we found that the average reuse figure and the figure for outright sale of all rights was a $1500 figure. That figure was then used starting in the early 70s and was actually printed in the 1973 Guide to Business Practices by ASMP.

Q. When you refer to users as part of the Committee on Valuation, would that include agents?

A. Agents actually were considered on the same side as the photographers. But the users were the advertising agencies, the promotion firms, the publishers of trade books, textbooks and encyclopedias.

Q. Did it also include producers of material for the education world?

A. Some of the people queried had what were called film strip or media divisions that did film strips, wall charts and so on.

Q. Is the defendant one such company?

A. Yes.

Q. What is the Society for Visual Education?

A. It is also a company that produces what we call corollary material such as film strips, wall charts, posters.

Q. Explain to the ladies and gentlemen of the jury [335] what you mean when you refer to film strips?

A. Film strips were sort of the forerunner of the CD ROM or the video. And they were a long strip on 35 millimeter film of individual still photographs that were projected in a special projector and could be shown to an entire classroom.

Q. And was the manufacturing of film strips the heart of or exclusively the defendant's business for many years?

MR. MONTBACH: Objection.

THE COURT: If she knows. I don't know how she knows.

Q. Let me withdraw that question and lay a foundation. Are you familiar with the defendant in this action, Guidance Associates, the Center for Humanities?

A. I certainly am.

Q. Would you explain to the ladies and gentlemen of the jury how you're familiar with the company?

A. Well, during my years at Photo Researchers, the mid to late 70s and into the 80s, the Center for Humanities was a repeat client. We saw their representatives on a regular basis and we certainly loaned transparencies and we billed for the rights to transparencies on many occasions.

Q. And what was the nature of the defendant's business?

[336] A. They were producing film strips for the educational market.

Q. And they would produce these film strips by use of stock photographs?

A. Largely by stock but they also would commission photographers to shoot specific things.

Q. And what is the Stock Photo Handbook?

A. The Stock Photo Handbook is another publication of the American Society of Media Photographers. It came much later in the game in the late 80s and around 1990, and it was again a book to give an overall view of the stock photo marketplace.

Q. And does the Stock Photo Handbook discuss the $1500 minimum industry standard?

A. Yes, it does.

Q. What is the Legal Handbook of the Picture Association Council of America?

MR MONTBACH: Objection, your Honor. I don't understand the relevance of all these handbooks.

THE COURT: I'll sustain the objection. Unless it's brought home to show an active participation by this defendant in the relevant time periods, such as signing an agreement or something of that sort.

Q. Ms. Kinne, are you aware of the defendant's place in the industry?

[337] A. Yes, I am.

Q. Do you know if the defendant was a member of industry organizations, photography industry organizations?

A. I can't say firsthand knowledge that I know that.

Q. What is a delivery memo?

A. A delivery memo is the document that a user receives when he borrows photographs for possible reproduction.

Q. Ms. Kinne, I show you what's been entered into evidence as Plaintiff's Exhibit 13A from Photo Researchers, your former company. Can you identify that document?

A. Yes. This is a sample copy of a delivery memo, but there is no customer information on the front side.

Q. It's just a blank form?

A. That's correct.

Q. I show you what's been admitted as Plaintiff's Exhibits 13F and 13G from FPG International. Would you tell the ladies and gentlemen of the jury what those are?

MR. MONTBACH: Objection.

THE COURT: Are they in evidence?

MR. S. ABADY: Yes, your Honor, they're in evidence.

THE COURT: If she knows what they are they can tell what they are. I believe that first document is not in evidence but I may be wrong.

[338] MR. S. ABADY: 13A is not in evidence? I would move it into evidence for the same reasons that you admitted F and G.

MR. MONTBACH: I think 13 is in evidence.

MR. S. ABADY: I have that marked also as in, your Honor.

THE COURT: Do you understand what these two exhibits are?

A. Yes, I do.

THE COURT: Answer the question.

A. The FPG form with the blue stripe is their delivery notice and the one with the reddish purple one happens to be a blank invoice form.

Q. How many members are there of the Picture Agency Council of America?

A. At the present time I believe it is 101 that are full members. There are some associates and pending members.

Q. Is it the practice of the industry, meaning all the members of the Picture Agency Council, when conveying original color transparencies to do so with a delivery memo?

MR. MONTBACH: Objection.

THE COURT: I think that's already been testified to by a prior witness. The jury should understand that there's no evidence at the present that either of the [339] parties to this litigation are members or bound by it. Also there's no delivery memo in this case.

MR. S. ABADY: We understand that, Judge.

THE COURT: As long as the jury understands that I'll allow the question.

A. To my personal knowledge, each and every member of the Picture Agency Council uses a delivery memo.

Q. And on the delivery memo—are you familiar with the delivery memo forms used by the membership?

A. I am. I've just recently completed a review of all of the paperwork of the various member organizations.

Q. And is the $1500 minimum industry standard printed on each and every agency's delivery memo form?

MR. MONTBACH: Objection.

THE COURT: I'll take the evidence subject to the cautionary instruction to the jurors that these particular parties in this particular case did not have such a delivery memo. But they may consider the existence of this arrangement for whatever

information it may supply to help them evaluate the missing slides.

A. The vast majority of the members in the Picture Agency Council use the $1500 figure. A few are now using a 2,000 or $2500 figure.

Q. That's the value of one color transparency?

A. One original color transparency.

[340] Q. Why is it that some members have increased the minimum value of one transparency?

MR. MONTBACH: Objection.

THE COURT: Common sense. I'll let her answer. You know it ought to be obvious, it shouldn't even be necessary to ask.

A. It is the obvious inflationary factors that have occurred since the late 1960s.

Q. I want to show you what's been previously marked and I'll do these all at once, your Honor, as 13B, 13C, 13D, 13E, 13H. Do you recognize these?

A. Yes. These are delivery memos from Magnum Contact Press Images, Sports Illustrated, Impact Visuals and a Magnum invoice as well.

Q. And are those all stock agencies in New York City?

A. Yes, they.

Q. And those forms all contain the minimum industry standard?

A. They all contain a standard. I believe one of them is the higher figure. Maybe I'm wrong. No, it's all at 1500.

MR. S. ABADY: I offer these in evidence, your Honor.

MR. MONTBACH: Objection.

[341] THE COURT: Are any of them to this defendant?

MR. S. ABADY: None to this defendant. All as part of the industry.

THE COURT: I'll take them with the understanding that they don't involve this defendant or this plaintiff. We don't need to show what other people in the industry are doing.

MR. MONTBACH: They're not relevant.

THE COURT: They're subject to cross-examination as to whether they really pay the money.

MR. MONTBACH: They're not relevant to this case.

THE COURT: Just the practice of either people in the industry.

(Plaintiff's Exhibits 13C for identification were received in evidence)

Q. In this case, Bill Gasperini did not deliver a memo to the defendant when he delivered 300 and later 10 slides to the defendant, does that make sense to you?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Do you have an explanation as to why that might be the case?

MR. MONTBACH: Objection.

THE COURT: Sustained.

Q. Is it the practice of a producer or editor of a [342] video series to use the delivery memo or are delivery memos used only by someone who is providing only original stock photography but is not staying with the photographer?

MR. MONTBACH: Objection.

THE COURT: If she knows.

A. Normally if the photography belongs to the producer or director, there is not necessarily a memo.

Q. Why would that be?

A. Well, it would sort of be like writing a letter to yourself.

Q. Is that because the producer and the photographer stayed in possession of the material?

MR. MONTBACH: Objection.

THE COURT: She's answered it. It would be like writing a letter to yourself. That's her answer.

Q. Mrs. Kinne, how are the photographs of photojournalists and other photographers valuated in your experience in.

MR. MONTBACH: Objection.

THE COURT: If she knows.

A. The professional photojournalist, once he has been edited, is valued as the industry at $1500.

Q. What are the criteria used to determine the value of an original color transparency?

A. Well, first of all it is the technical excellence [343] of the photograph. The second can be called the aesthetic value or the particular eye of the photographer. The third is usually the subject matter, the value of the subject matter, the way the subject matter has been treated. It's also the value of a particular photograph in relation to a whole particularly with a photojournalist where he's trying to tell an entire story.

Q. How would the market value of the 310 lost slides be determined?

MR. MONTBACH: Objection.

THE COURT: Overruled. Have you been asked to give an opinion as to the value of the 310 slides in this case?

THE WITNESS: Yes, I have, your Honor.

THE COURT: How did you go about forming such an opinion?

THE WITNESS: I viewed what material Mr. Gasperini was able to bring me of a similar type from other parts of the world, a few from Central America. I interviewed him extensively about his habits as an editor and then I asked him to

select with me the photographs that are here and I witnessed for myself his ability to edit a cross-section of his material.

Q. Did you have occasion to view the video series which has been in evidence as Plaintiff's Exhibit 10 [344] entitled Conflict in Central America?

A. Yes, I have seen all the videos.

Q. And did you look at the still shots which were Mr. Gasperini's slide transparencies?

A. I looked at them but basically for their content. It's very hard from a video to make an accurate judgment of what the original might have been.

Q. And based on all of the work that you've just described, can you ascribe a value to the lost 310 slides?

A. Yes. And I valued them at $1500 each.

Q. And how is it that you reached that conclusion?

A. Because I had become convinced that he was a professional photographer taking professional quality slides that had been professionally edited.

Q. Now, $1500 for a picture sounds like a lot. Can you explain to the ladies and gentlemen of the jury how you reached that conclusion?

A. Well, first of all if these transparencies were available, they could, in the stock photo marketplace, be used for a great variety of purposes over a very long period of time.

Q. Could you explain that please?

A. Well, Mr. Gasperini holds the copyright in each of his photographs. And that copyright is good not only for his lifetime, but for 50 years beyond. So that it becomes a [345] part of his estate. During that long period of time, the pictures, many of them would be used a great many times for a great variety of fees. And the fees can range anywhere from 50 to $75 for some of the disks that are being done today, to as many as $10,000 for rather common, ordinary advertising shots. You do that over and over for the life of the copyright, and the $1500 becomes a very fair and reasonable figure.

Q. Now, is market value the primary means of establishing the value of an original color image?

MR. MONTBACH: Objection.

THE COURT: It calls for a question of law, doesn't it.

Q. What is the primary means of establishing the value of an image?

MR. MONTBACH: Objection.

THE COURT: I think that's the same question coming through the back door. The court has already told the attorneys its view on what the market value is.

Q. Do you determine the potential value of lost property, that is in this case lost photographs, based on the past market history alone?

A. No.

Q. And why not?

A. For one thing we never know from day to day what [346] will be asked for. We have some long time knowledge from our experience in the industry but a single news event can change that very easily.

Q. Could you give an example?

A. Well, the recent D-Day. There were pictures of D-Day that had never been published. All of a sudden as we approached the 50th anniversary, every publication, every TV station, even your local newspaper was out looking for material from D-Day 50 years ago and particularly for things that the public hadn't seen before.

Q. Where would they obtain this material?

A. Well, from many individual photographers, from stock agencies and from a lot of historical sources such as state libraries and so on.

Q. Are there libraries that are never used as stock that attain value?

A. Photographers and others often times maintain a photo collection for many, many years and don't particularly think about its value or the value of a particular image until a customer comes along who is searching for one particular image with certain qualifications.

Q. Do some color photographs become more valuable beyond the lifetime of the photographer?

A. In my experience that has happened a number of times, that the photographic estate increases in value for a [347] number of years after the death of the photographer.

Q. Are there photographic libraries of magazines for example that were not used to stock photography that still have value today?

A. There are many that those of us who have a historic feeling would like to open up for the public.

Q. But specifically to bring it home, magazines that the jury would be familiar with, Time, Newsweek, Life, common magazines, do some of these have photography which has value even though it has never been placed in stock?

A. They have libraries of material, almost all of them now do have a stock operation but it does not necessarily include all of the material. National Geographic has just, within the last year, decided to open their files for use by others.

Q. Would Mr. Gasperini's best photos of the civil wars in Central America have value in the future?

MR. MONTBACH: Objection.

THE COURT: If she has an opinion.

MR. MONTBACH: Pure speculation.

A. I believe they will have value in the future as the history of Central America grows, looking back to see why certain things happen, how they happened. That's certainly been the case with other areas of the world.

Q. Besides the things that you've mentioned already, [348] computers, newspapers and magazines, are there other types of media in which stock photography is used?

A. Well, it's used in advertising. And by advertising I don't necessarily mean the big billboard or the double page spread in the magazine, but all the travel brochures you see, wherever there are brochure racks in airports, hotels and so on, they're all the things that come with your monthly credit card

that contain photographs promoting or advertising one thing or another. There are endless textbooks, trade books and now this whole realm of disks of one kind or another.

Q. How important is prior sales history in determining the industry standard?

A. It can have bearing but it is not a good indicator in all cases.

Q. Why not?

A. Frequently—I can give you one very good example. The picture that appeared on the sides of U.S. mail trucks and on the Express Mail package for a long period of time of the bald eagle with its head turned way to the left and a full moon behind it, that is two pictures. That bald eagle sat in a file that I managed for eleven years. I went in and out, was never chosen until the day that the Postal Service arrived with a predetermined layout that said they had to have an eagle with its head turned all [349] the way to the left.

Q. And how much money has that singular photograph generated?

A. I haven't been in on the very last of this but it was well over $20,000 when I last checked it, which was in 1986.

Q. That would be just for a one-time use?

A. It was for use in connection with Express Mail.

THE COURT: That was not a photograph, that was artwork was it not?

THE WITNESS: It was a composite photograph composed of the eagle, the moon was a separate photograph. It was taken into the studio or darkroom and the two put together to do what we call a sandwich.

Q. Ms. Kinne, I show you what's been admitted in evidence as Plaintiff's Exhibit 12A, these three documents, and I ask if you recognize them?

A. Yes, I recognize them.

Q. I show you what has been previously marked as Plaintiff's Exhibit 23, let the record reflect I've provided counsel a copy, and I ask you if you recognize that?

A. Yes, I recognize it.

Q. Would you explain these documents, that is 12A and 23, to the ladies and gentlemen of the jury?

A. The first one is an invoice to the Center for [350] Humanities from Photo Researchers. It is for the loss of what is seven original color transparencies.

The second document is a portion of Photo Researchers sales book recording each invoice and the pictures and photographers involved in each invoice.

The third is a letter from the Center for Humanities addressed to me. It was dated February 2, 1977 and it indicates that there is a question about some pictures which the Center would like to have verified as to whether we know if they've been returned or not.

The final piece of paper is a page from my memo pad in my handwriting dated October 13, 1977. And again listing the same photographs and recording a discussion I had concerning a negotiated settlement for the loss of those seven transparencies.

Q. Was the minimum industry standard on the documents $1500 for the seven images?

A. In 1977 it would have been, yes.

Q. Did the defendant pay the full amount or some other amount?

A. No, the defendant did not pay the full amount. There was a negotiation that went on which my memo indicates what that was about. And they, in the end, paid S4500 for the seven.

Q. Could you explain what it was about?

[351] MR. MONTBACH: Objection.

Q. Referencing number 23.

THE COURT: The question is an ambiguous question. As I understand it what makes this effective is putting in the memorandum receipt, isn't that right? That's why it's printed on the back.

THE WITNESS: Right.

Q. Was there a reason, Mr. Ms. Kinne, in this transaction why the defendant did not pay the full amount?

A. Yes, there was.

Q. Could you please explain to the ladies and gentlemen of the jury?

A. Well, first of all they came forward when they realized that they couldn't account for the seven pictures and when it was verified that we did not have them, they entered into a series of discussions about how they could settle the matter and it was done quickly. It took into account the particular pictures, some of which were of buildings and very common objects. It also took into account the desire of the particular photographers who were all aware that the Center for Humanities was a very good client, that we tried to reach an amiable settlement.

Q. Now, is the minimum industry standard of $1500 largely observed by the industry or honored only in the breach?

[352] MR. MONTBACH: Objection.

THE COURT: If she understands the question I'm going to let her answer that because I'd kind of like to know that myself. It was obvious it was enforced in this case.

THE WITNESS: The industry is a reasonable industry and where we can, and there's evidence that negotiation of some other figure is warranted, fine. But in the vast majority of cases they pay the $1500.

Q. By "they" you refer to users such as the defendant?

MR. MONTBACH: Objection.

Q. Is that correct?

A. Yes.

MR. S. ABADY: One moment, Judge.

(Pause)

MR. S. ABADY: Thank you, Ms. Kinne. I have no further questions at this time.

THE COURT: Counsel may cross-examine.

MR. S. ABADY: If I haven't done so I would move Plaintiff's Exhibit 23 in evidence.

MR. MONTBACH: Objection.

THE COURT: I'll rule on it later. Hand it to the clerk. You're objecting to 23?

MR. MONTBACH: To the first word on the memo, **[353]** your Honor?

THE COURT: Objection sustained. You didn't look at the whole sentence. Please proceed.

CROSS-EXAMINATION

BY MR. MONTBACH:

Q. Ms. Kinne, what is a catalog chrome, a term you used?

A. Most of the stock photo agencies in the mid 80s and onward produced catalogs, representative pictures of their files. Those catalogs were printed in large quantity and distributed to 20 to 50,000 people who purchased photographs. They were printed with the idea that they would generate requests, simultaneous requests for given photographs from many places and therefore the catalog chrome, and I use that meaning each and every picture appearing in a catalog, had to be duplicated in order to fulfill simultaneous requests.

Q. You say that a duplicate can come close to the same quality as an original, is that correct?

A. It can if you don't mind how much money you spend.

Q. How do you do that?

A. You do it in a lab by exposing the original on to duplicating film and then processing that. That can be done in a traditional sense or for the very, very fine image you **[354]** are projecting an aerial image and capturing that.

Q. Isn't it true that now any picture can be digitized and anything can be done with any picture?

A. Anything can be done. The quality is still somewhat I have iffy.

Q. It can be improved, can't it?

A. It depends on what you mean by improved. It can be changed.

Q. A picture can be made lighter?

MR. S. ABADY: Objection. There's no proof that the duplicates here were digitized.

THE COURT: Overruled.

Q. So an original can be digitized and improved to the first quality?

A. I have looked at a lot of digitized images that were given to me to replace largely damages. I have accepted only one.

Q. Mountains can be moved in pictures and everything?

A. Pyramids I think it was.

Q. Woody Allen can be put into movies?

A. Yes.

MR. S. ABADY: Or prison.

Q. You talked about the problem—

THE COURT: Whatever she talked about they heard.

[355] Q. With regard to duplicates having lost some focus, focus can be changed, put back in by digitizing?

A. You can attempt it. It's not very successful.

Q. What is saturation? I don't understand that term?

A. That is the ability to reproduce the color with its full vibrancy as in the original object.

Q. That can be done with a duplicate through digitation?

A. You can change color and deepen it in digitizing. In fact, it's harder to get it exactly as it was. It's easier to either lighten or darken it.

Q. You can put it into any color you want to?

A. You can totally change it.

Q. Now, you spoke of—

THE COURT: No, no.

Q. The uses as far as advertising. With regard to advertising, when you saw Mr. Gasperini's pictures, do you feel that those pictures, I'm talking about the war pictures in Central America, could be used in any advertising?

A. I have seen war pictures used in advertising. Not necessarily the Contra revolution but certainly the Gulf War.

Q. Have you done any research into whether or not Contra revolution, Central America pictures from the mid to [356] late 80s have been used in advertising?

A. No, I did not.

Q. In fact, Mr. Gasperini's pictures would be used for editorial purposes in the main, would they not?

A. They could be used for promotion and advertising and a very large editorial market, yes.

Q. Promotion of what?

A. You'd be surprised. We see pictures of Viet Nam conflict advertising travel to Viet Nam in peace time.

Q. Showing pictures of the war?

A. Some of the war pictures were used because they made such an impression on people and now the view is purportedly very different.

Q. Many of the pictures that are on the list admitted in evidence are of actual war areas.

A. A portion of them, yes.

Q. Are you telling us that those would be used and engender a lot of income from advertising or are you saying that those would be mainly used for editorial?

A. I said they could be used in this type of advertising.

Q. Did you see any of the ten pictures that Mr. Gasperini did not edit?

A. No. Of course not. They were gone.

Q. And you're assuming that these are also worth [357] $1500 each?

A. By what I have been told about their selection as representative, yes.

Q. What were you told about the selection?

A. I was told that Mrs. Gasperini went to the files of pictures and selected representative views.

Q. Did you talk to her about her ability to edit pictures?

A. I have talked to her but not in depth.

Q. About her ability to edit pictures?

A. No, I haven't.

Q. You talked to her but not about editing pictures?

A. No. But she's certainly well-informed on the subject area.

Q. And you weren't given any description of what those ten pictures were?

A. No, I was not.

Q. Yet you still think they're each worth $1500?

A. I say that based on his ability as a professional photographer, yes.

Q. What about the 4700 other pictures that are sitting in the courtroom that Mr. Gasperini took of that area. Are each of those worth $1500?

A. Not all of them, sir. I think they would have to be subjected to an additional edit.

[358] Q. Some of them are merchantable?

A. They may be. I haven't looked at them item by item for that purpose.

Q. In fact, when someone edits, don't they edit for a particular purpose?

A. That can be one criteria. If you're an agent as I have been all my life you have to edit for a whole host of purposes.

Q. You spoke of a story line. You're editing for a certain story that you want to convey to your public, is that correct?

A. That can be the case or it can be an overall story. It can be an overall recording of what is there at any given time.

Q. So then it's true then that pictures that may have been rejected for a certain editing process would be perfectly good for another editing process, is that correct?

A. That's why I suggested that we have to go back through the others and see. There may be some, although I found out by watching that Bill Gasperini is a very good editor.

Q. For a particular purpose, right?

A. He had a purpose in mind, yes.

Q. And when a photographer such as Mr. Gasperini takes pictures of a subject, he takes multiple pictures, is [359] that correct?

A. Well, he doesn't just shoot one picture. But if you believe the basic definition of photography, he takes a series of pictures. No two of them are exactly alike.

Q. And he was taking these pictures when he was performing his job as a journalist and a radio journalist, is that correct?

A. That is correct.

Q. So his primary function while he was taking these pictures was to gather information for writing or speaking, rather than photography, isn't that correct?

A. All photographers are gathering information at all times. Whether they are communicating that information by spoken word, written word or image depends on a given situation.

Q. A photojournalist who is hired to go down and take pictures is down to take pictures, that's his primary job, is that correct?

A. If he is fortunate enough to work for an organization who is able to have individual specialists, not people who do many tasks.

Q. Am I correct that if you were to go with a different story to the 4700 slides, you could possibly edit those out and have a different story and they would be perfectly merchantable?

[360] A. It's possible, although I suspect you would miss the 300 that had already been taken.

Q. We all know that those 300 are not there.

MR. S. ABADY: 310, judge.

Q. Those slides are not there.

THE COURT: I think at this stage of the trial the jury knows that. Maybe if you keep repeating it, you'll be sure they know it.

Q. Those 310 are not there.

THE COURT: We know that.

Q. Is there anything that you know that would preclude Mr. Gasperini or any other photo editor from going to his 4700 other slides and taking out other slides that could be merchandised and sold for editorial purposes?

A. There's nothing to prevent them from looking to see if they're there.

Q. Is there a demand today for Central American slides?

A. Yes, there is.

Q. Has there been a demand over the last ten years for Central American slides?

A. Yes. In regard to certain issues such as the conflicts.

Q. Has that demand had any fluctuation over the last ten years?

[361] A. It fluctuates with events.

Q. And do you have any knowledge as to when the peak in that demand was?

A. I couldn't say that I was right on top of that, no.

Q. Did you do any research into that in preparation for coming here today?

A. No, I did not.

Q. Do you know how many magazine articles have been published about Central America, war in Central America over the last nine years?

A. No, I did not.

Q. You didn't research that?

A. No, I did not.

Q. You don't understand that it has fallen off dramatically over the last five years?

A. I know that interest in Central America has fallen off a number of times over the years I've been in the photo business to reappear again.

Q. Is there any, to your knowledge, any ground swell of need of photographs of Central America such as the D-Day situation that we have now or had recently at the present time?

A. Not at the present moment.

Q. Has there been any such ground swell on [362] anniversaries of events in Central America?

A. I think every year on the birth dates of some of the heroes of South America we get asked about those people.

Q. And you have slides to fill those requests, is that correct?

A. We have various types of illustrations, yes.

Q. None of them are Bill Gasperini's?

A. I never had the good fortune to represent Mr. Gasperini.

Q. How would someone who needed those slides today get Bill Gasperini's pictures for Central America without getting the 310 slides?

A. Well, if he has some material with an agent and if they address that agent they may get some material. They may know how to reach him. I don't know. Photo Researchers keep amazing files.

Q. Are there any publications that people could look at?

A. There are some but in the editorial area, they are not vast.

Q. As a matter of fact, people go to the stock agencies for the subject, not the photographer, isn't that correct?

A. Stock is largely anonymous for most users.

Q. So if someone's photographs are not in the stock [363] agencies they're not going to get out to the public or earn any money?

A. Through a stock agency. But there are researchers who go to individual photographers.

Q. If you were to obtain pictures for Central America in the 80s in the wartime, where would you look?

A. I would be very apt to go to several of the agencies to specialists in in-depth reporting. Such as Impact Visuals. I might go to Sigma, or to Gannon or Liaison as it's now known.

Q. Magnum?

A. I might go to Magnum.

Q. If you went to Impact Visuals you wouldn't get any slides from Mr. Gasperini, would you?

A. He has some material there. I have not questioned what it is, exactly.

Q. I'm talking only about slides of Central America. When you were at Photo Researchers and you delivered images to your customers, how did you deliver them to them?

A. In the days that I was there a lot of it was done by messenger or courier. Some of it was done by United Parcel. And in the latter days some of it was done by Federal Express.

Q. And your testimony was that you always had this memo that went with it?

[364] A. Each package contained a delivery memo.

Q. And what would be on that delivery memo as far as listing of what was being transferred?

A. It would contain the identifying number of each transparency. Photo Researchers had its own system.

Q. Would you have delivered slide transparencies to any of your customers without any enumeration of the number or identifying marks or descriptions?

A. We had to when it was a whole assignment coming through. But otherwise we would deliver them as numbered photos.

Q. What do you mean as a whole assignment coming through?

A. We had photographers, who we arranged to have cover specific events in various places in the world. The film came in. Our sole responsibility was to have it processed and transmitted to whoever assigned it.

Q. You acted as a conduit?

A. As part of our agency representation.

Q. I'm talking about—

THE COURT: She's answered you. Go on to something else.

Q. Where do photographers who want to sell from stock advertise themselves?

A. Sell from stock?

[365] Q. Sell stock photos.

A. Not all of them do but some of them have ads in the various, what we call the books, the creative books. But those are largely aimed at advertisers.

Q. How many stock agencies are there worldwide?

A. That's a good question. We've tried through PACA to find out over the years and it's probably somewhere between 4 and 500.

Q. Is there an average number of slides each one keeps in their inventory?

A. Not at all. They vary from very small to very large operations.

Q. Some have thousands, millions?

A. Comstock had 4 millions.

Q. So there are millions and millions of stock images sitting in stock agencies throughout the world?

A. Yes.

Q. What are the odds that any particular image would be chosen to be used?

MR. S. ABADY: Objection to odds.

THE COURT: Can you answer that?

A. I have no accurate firsthand knowledge of how often or what the chances or probability is.

Q. The odds are pretty slim.

THE COURT: Pretty slim. We know that. Let's go **[366]** on.

MR. MONTBACH: I have no further questions, your Honor.

THE COURT: Any redirect?

MR. S. ABADY: Very briefly, Judge.

REDIRECT EXAMINATION

BY MR. S. ABADY:

Q. Ms. Kinne, are you familiar with or have you seen any of the trade publications of the military industry in this country?

A. On occasion a few of them.

Q. And those publications for advertising purposes and not for editorial purposes use stock photography of war scenes, is that correct?

A. Absolutely.

Q. Now, if some of Mr. Gasperini's outtakes, that is the pictures he rejected, are worth $1500, does that mean that his select pictures which the defendant lost are worth less or more?

A. They certainly are not worth less.

MR. S. ABADY: That's all I have.

THE COURT: Anything else?

MR. MONTBACH: No further questions.

THE COURT: Thank you, very much, Ms. Kinne. You're excused.

[367] (Witness excused)

THE COURT: We'll see you at 9:30 tomorrow morning. You're excused for the balance of today.

(Jury not present)

[367] THE COURT: As I understood it, the last witness has appraised collections of photographs for estates and for gifts. Neither of you asked her what a reasonably well-informed buyer, what a reasonably well-informed seller under no compulsion to buy or sell would have paid for the collection of 310 transparencies and it's really not my function to try the case for you. She was a knowledgeable witness and it's incredible to me that every single one of 310 photographs is

worth $1500. Some of them are probably worth more than $1500 and some are probably worth very little.

And I just think you've left this jury with no guidance when you could have provided it. I really think maybe both of you should rethink your position on this case and see if you can find a way to resolve it before it goes to the jury.

MR. S. ABADY: I take what you say as insightful.

THE COURT: She could have answered that.

MR. S. ABADY: I don't think anything that you say will cure the coverage issue and that's the reason this case has to be tried. You have to speak to those gentlemen **[368]** and that table.

THE COURT: Nobody with any brains can believe that every single one of those is worth $1500. Some are worth more and some are worth less.

MR. S. ABADY: He's 39 years old. Who knows 50 years after his death what they'll be worth.

THE COURT: You can't speculate. You're making a grave mistake of tactic. That's your business.

MR. YOUNG: Since I'm here on behalf of the Center for Humanities and since Mr. Abady said that the coverage issue is the problem, I feel compelled to bring to the court's attention that Mr. Abady three days prior to the time that I came here to start the trial upped his demand by $250,000.

THE COURT: There's really not very much I can do about that. Somebody has a very wrong view of this case. I really don't think that it is I.

MR. YOUNG: There's no way for us on behalf of the Center to resolve it.

THE COURT: I'm going to be here and preside over a verdict and you can cross-appeal to the Court of Appeals. Here you had a basic question that this witness could have

answered and neither of you asked it. So it's your red wagon. What's left here to do?

MR. S. ABADY: We're ready to rest.

[369] MR. MONTBACH: You have no further witnesses? He subpoenaed some of our people.

THE COURT: He's just told you in plain English, as plain as he has used during the trial, that he has no more witnesses and he's going to rest.

MR. MONTBACH: I've asked him about the subpoenaed witnesses who he has before said may be needed on rebuttal.

MR. S. ABADY: I'm not releasing them if they're needed on rebuttal. And you wanted to fly a witness out of the country.

THE COURT: How many witnesses do you have?

MR. MONTBACH: Two and possibly three.

THE COURT: Have them all here in the morning.

MR. MONTBACH: I will.

THE COURT: What the court proposes to do, I'm required to go to Foley Square to be there at one. I plan to leave the jurors with the projectors so they can watch these three volumes and I'm going to order them not to discuss them but just to look at them, probably in the jury room, and to look at this other lengthy exhibit or exhibits but not to discuss them, and then to go to lunch and I'll resume with all of you as rapidly as I get back from Foley Square, which very likely will be—we now have a message from a juror that says she has to register for school in New **[370]** York at eleven o'clock tomorrow.

We're on the edge of the Fourth of July weekend. This should have been a one-day case. Both of you have magnified it unduly and I don't think they want to come back after the Fourth.

The court has motions and sentences and criminal matters on Friday. I think you'll just have to tell the juror to be here unless you want to go with five.

MR. S. ABADY: The other option, your Honor, we could meet you at Foley Square if she has to register in New York we could all meet in New York.

THE COURT: We need a courtroom, we need a deputy clerk, we need the court reporter. That is the most fantastic—you're living in a dream world.

MR. S. ABADY: I knew you were the chief judge, your Honor.

THE COURT: I'm no longer the chief judge. I don't have a courtroom in Manhattan and there are more judges than courtrooms.

MR. J. ABADY: Which juror is it?

THE COURT: Number 6.

MR. S. ABADY: Also, in light of your discussion I think what we might do then in the morning for five minutes would be to complete with Ms. Kinne as to the line of questioning that you—

[371] THE COURT: She's excused. I'm not going to bail you out. You won't listen to me and you keep making remarks when I make rulings and you're arguing issues in front of the jury. I think you have an unrealistic view of this case.

MR. S. ABADY: Your Honor, all I can say is that the level of research as to how these cases have been tried in the past.

THE COURT: You won't listen. It doesn't do any good to talk to someone who won't listen. What is your pleasure about this juror?

MR. MONTBACH: I cannot waive six, your Honor.

THE COURT: What about you?

MR. S. ABADY: I'd be prepared to make sure that we finish before the end of tomorrow.

THE COURT: I think you'll have to tell her. You're going to have a discontented juror listening to your drivel. Tell her she'll have to be here and she'll have to make whatever other arrangements she can. The greatest thing to have in the jury room is a discontented juror who doesn't want to serve.

(Pause)

(Juror six present)

THE COURT: I understand you have a problem but we have a problem too. We're down to six jurors and we're [372] coming close to the Fourth of July and everybody has invested a lot of time and effort in this case and I'd really like you to stick it out and complete your jury duty.

JUROR SIX: I need to go to graduate school.

THE COURT: Is that the only day you can register?

JUROR SIX: I missed the other day because I was here.

THE COURT: Have you called them up and told them you're on jury duty?

JUROR SIX: I was hoping we'd be done.

THE COURT: What school is this?

JUROR SIX: Bank Street College.

THE COURT: You call them up, tell them you're on federal jury duty and if they forfeit any rights on that ground, the court will report it to the United States Attorney. I'm awfully sorry. I know that this case should have been concluded by now but it's unavoidable and it's part of your civic duty. I can't excuse you. You'll have to be here.

Good evening.

(Trial adjourned to Thursday, June 30, 1994; 9:30 a.m.)

[373]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7204 CLB

WILLIAM GASPERINI,

Plaintiff,

v.

THE CENTER FOR HUMANITIES, INC
d/b/a GUIDANCE ASSOCIATES,

Defendant.

June 30, 1994 9:50 a.m.

Before:

HON. CHARLES L. BRIEANT,
District Judge.

APPEARANCES

RUBIN, KALNICK & BAILIN
Attorney for Plaintiff
SAMUEL A. ABADY
JONATHAN S. ABADY

BIGHAM ENGLAR JONES & HOUSTON
Attorney for Defendant
FRANCIS A. MONTBACH

MARTINDALE & BRZYTWA
Attorney for Defendant
KEVIN H. YOUNG

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[374] (Jury present)

THE COURT: Good morning, members of the jury.
Mr. Abady, you can go forward at this time.

MR. S. ABADY: On behalf of the plaintiff, William Gasperini, this case is concluded, we rest.

THE COURT: The plaintiff rests.
Mr. Montbach, you may now go forward on behalf of the defendant.

MR. MONTBACH: Thank you. The defendant calls as his witness Mr. Gideon De Margitay.

GIDEON DE MARGITAY, called as a witness by the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MONTBACH:

Q. By whom are you employed?
A. I'm self-employed.
Q. What is your business?
A. I'm a consultant for editorial projects.
Q. What does that involve?
A. Involved with visual projects, photography.
Q. For whom do you provide your consulting services?
A. I had—my principal client for the past 10 years also was Time Incorporated.

Q. What have you been for Time Incorporated?

[375] A. I was involved in a magazine launch project and I was involved in various book projects, picture book projects which were quite extensive. They usually were two years worth each and resulted in big photographic books. Not photographic books, books richly illustrated.

Q. What was your involvement in producing these books?

A. These books were for use by a whole team of people like a magazine is produced. And my title was editorial coordinator which there was an editor, there was an art director, we had writers, picture researchers, and I think I could sum it up by saying that the editor wrote the music, the art director provided the orchestration and I directed the orchestra.

I bought the pictures, negotiated for them, was responsible for the budget also and every single photograph and every piece of copy cleared through my desk and I was responsible for putting it together in a book.

Q. And what were the titles of these books?

A. One of them was Life's *History* of *World War II*. I have it here if you want to see it. I brought along another big one, which was on the Kennedys, which was, the title is *Life in Camelot, the Kennedy Heirs,* and there were several smaller books.

Q. Would you just show me what books you're talking **[376]** about?

A. Certainly.

Q. What are you listed as in your job?

A. I am listed as editorial coordinator.

Q. Thank you. You can put the books down.

Would you give us a thumbnail sketch of your background, sir?

A. I will try to make this very brief. I'm sorry, I don't mean to bore anybody with it.

My involvement with the picture business started in 1947. That year is was in news pictures in the Paris bureau of the New York Times. Three years later I left and I joined a New Jersey agency, which was one—which was the successor

agency for the Marshall Plan, and I was deputy chief of the photo branch of the information setup. I was responsible for assigning about ten photographers throughout your Honor to cover various Marshall Plan activities. That was then.

And then I rejoined the New York Times in 1954, this time in New York and stayed there until 1961. During that time I was instrumental in introducing 35 millimeter photography into the newspaper. This today seems to be normal but in those days everybody was big bulky speed graphic cameras and this brought really new photographic techniques into the newspaper business.

[377] I left them in 1961 and rejoined Magnum Photos Inc., international picture agency which is considered the Tiffany of the business, it's an international photograph journalistic cooperative which in those days had as its prime photograph members people like Henri Bresson, Cornell Capa, Burt Glinn, and internationally recognized very big names. In Paris also. And our clients were leading picture magazines, not only in the United States but also in Italy and France and so on and so forth.

And my job was to represent these photographers and get them the best assignments and the best deals possible. We also maintained an extensive picture library so we acted at the same time and Magnum still acts both for first rights and assignments and as a stock house.

I left at the end of 1963 and joined the editorial department of Life Magazine. And work and stayed with Time Inc. then for the next ten years or so.

My assignment was to go overseas and they sent me back to Paris for this and set up an international syndication outfit. Syndication really means selling pictures or selling copyrights. And with a network of agents I set up we sold Life Magazine pictures and at times text throughout the world.

I returned to the United States again in 1972 and in my assignment was to then make that effort, which **[378]** incidentally encompassed not only Life but all the Time Inc. mag-

azines at the time, nationwide, and introduce the whole system also in the United States.

I then left the company a couple of years later and had nonprint jobs, television and so on, and became self-employed and became an editorial consultant. As an editorial consultant, as I mentioned, one of my main clients was Time Inc.

Indeed until last year I had an office in the Time Life Building. I did these various books for them. I know that's overstating it. I was one of those who worked on these various books for them and I bought probably between $80,000 and $100,000 worth of pictures or picture rights for each of them. I was on both sides of the fence. I represented photographers on one hand, in other words I sold and I bought.

I think this sums it up, my background.

Q. Fine. And in buying photography throughout your career, from whom would you buy the photography?

A. When you say buying photography, we're talking now about buying already taken pictures. Because in the other field, which is assigning photographers, that is a completely different ballgame if you will. You buy it from stock houses, agencies, wire services and at times you don't buy it, you get free pictures from various sources, whether **[379]** they be U. S government sources, tourist offices, museums, what have you.

Q. Did you continue your buying process up until the present?

A. Up until last year when I finished the last project, yes.

Q. Sir, have you during the time, both as an employee of Time-Life or as an independent employee with Magnum, become familiar with situations where photographs have been misplaced or lost by—

A. Yes.

Q. —purchasers of photographs?

A. Yes.

Q. Have you had to deal with those photographs?

A. Yes, I have. I came across it at Magnum where some of our pictures got lost by one picture magazine. And it happened once. And we were annoyed and it happened a second time and we were quite exercised about it.

And we then, with our attorney, Howard Squadron, devised something to scare everybody out of their wits and we demanded $1500 in damages, which in those years, we are talking now of the early 60s, represented about one month's salary of a picture department clerk. And was supposed to put the fear of God into everybody and it did.

We never did get the $1500, but they paid a lot **[380]** of attention to this later on.

Q. You say you never—

A. And this $1500, whatever Magnum does usually is does by others so it became tradition in the picture business.

Q. Are you familiar with the custom and practice in the magazine industry—

A. Well, I was part of it for 40 years.

Q. —as to compensation paid for photographs for lost slides?

A. Yes. The compensation, at least in my experience when I had to deal with it, depended on many, many factors and was obviously subject to negotiation.

Q. What are those factors?

A. If you, as a client of mine, lost something, it depended how good a client you were: Did I really want to risk losing you as a client by exacting the last ounce of flesh, or did I want to come to a reasonable agreement with industry?

Q. Is there a standard practice?

A. Not in my experience.

Q. And have you discussed this with others in the industry?

A. Oh, it's generally known.

Q. What is generally known?

[381] A. It's generally known that everything is up to negotiation.

Q. That there is no standard practice?

A. There is no standard price list or anything.

Q. What are the parameters that you take into consideration in reaching this negotiated price?

A. In reaching the negotiated price, the parameters are really my relationship with a client, his ability to pay and my clout with him. I'm afraid it's very primitive, it's very basic.

Q. Does it have anything to do with the subject matter of the picture itself?

A. Obviously if somebody lost a picture by Cornell Capa, I would have more of a leverage than if somebody lost a picture of my own.

Q. Does the individual photographer who took the picture, does that person's identity have an effect on how much is paid?

A. It does affect the market value of the property. If it's a name, if it's a big name, internationally known, outstanding photojournalist, that's one price. And if it's a very good, talented, but not internationally known photographer, it's another one.

Q. Now, sir, did you have an opportunity to review the work of Mr. Gasperini?

[382] A.Yes, I did.

Q.What have you had an opportunity to review?

A.I reviewed with you in the offices of Mr. Gasperini's attorney a selection of photographs and I think I spent about two and a half or three hours looking at them. I didn't really count them. But there were several big shopping bags full of colors, color slides.

Q. Thousands of slides?

A. I would imagine so. Easily.

Q. Did you review anything else with regard to this matter before the court as far as Mr.—

A. I was shown a video cassette and I reviewed the video cassette which I believed was the product put out.

MR. MONTBACH: Do we have that video here?

MR. S. ABADY: Exhibit 10, your Honor. It's here somewhere.

MR. MONTBACH: I have a copy of it, your Honor.

THE COURT: It's in evidence here. The jury has seen it. We'll find it for you.

Q. Did you review anything else, sir?

A. I also saw the list which you gave me out of Mr. Gasperini's deposition of the situations covered during the time that he took the pictures which were lost.

Q. Is this the video which you reviewed, sir?

A. Yes.

[383] Q. And it's composed of still pictures and video?

A. It is composed of motion pictures plus some stills.

Q. Now, have you, as part of your position and your experience, had to determine the value of pictures?

A. Well, in buying rights to pictures, you automatically determine their value to you for your own particular project.

Q. Would you tell us how you do that?

A. You base it, wearing my hat as a buyer now not as a seller, I based it on the money that I had available for any given project. Obviously these, published by Time-Life, I had quite a considerable picture budget I could spend. So I would have valued pictures for this particular project more highly or I would have paid more. I don't want to use the word value, a value judgment is very subjective, but I would have been able to pay more for a picture used in this than I would have been if I had been doing a textbook, for instance, which is a much smaller picture budget.

Q. And what is the range of prices that you would be able to pay?

A. If I were to do a textbook, which uses a great many pictures, of course, but on a very stringent budget, I probably wouldn't be able to pay more than $50 a picture, maybe exceptionally 75. This doesn't sound like much but [384] those are, alas, the facts.

For these projects here, I would pay up to $300, at times 350 maximum, for full page use and if it's less than full page, less.

Q. A quarter page, approximately what would you pay for something like the Life book?

A. About 150.

Q. And would that be to a stock agency?

A. Yes.

Q. And the photographer receives?

A. Well, I would pay to whoever I might buy it from.

MR. S. ABADY: Objection, your Honor.

THE COURT: It's a matter for cross-examination.

MR. S. ABADY: He started a question and the witness starts a narrative.

THE COURT: Please don't both talk at once

THE WITNESS: I'm sorry, sir.

THE COURT: Please proceed.

Q. Dealing with a stock agency, how much would a photographer get of the price that you paid for a stock photo?

A. It depends on the arrangement. At times it's 50-50 and at times a stock agency may take 60 percent or even 70 percent.

Q. So the amount you would pay for a stock photo, [385] $300, $200, $100, a photographer would get a percentage of that?

A. Exactly.

Q. Have you reviewed, you have reviewed the photos in the video and the list?

A. Yes.

Q. Do you have an opinion as to the value of Mr. Gasperini's photos?

A. Again, if you forgive me I will not use the word value.

THE COURT: You' re not going to use the word value, I'm going to tell you not to answer —

THE WITNESS: Well then, what I would have —

THE COURT: Please, one talks at once. Answer the question asked of you. You can't modify the question.

Q. If you were to be putting out a book on Central America in the 80s, the war there, the conflict there, and you were to use, have available to you Mr. Gasperini's photography, what would you have paid for the use of that photography and how would you determine that?

A. Depending on my picture budget, whatever I used of it, I probably would have paid between 75 and $250. It depends on the use, in other words the size, and it depends whether I would have used it at all.

Q. In reviewing the listing of photographs that are [386] missing, were you able to determine, if you were to make a book that we have just spoken of, how many photograph scenes you would have used in such a book?

MR. S. ABADY: Objection, your Honor. That calls for—

THE COURT: I'll take it subject to cross-examination. You can cross-examine as to whether there's any factual basis for the answer.

MR. S. ABADY: Thank you, Judge.

A. Based on the list that I have seen, I think there were eight general situations that might have been of interest. And as I counted on the list, there are 47 slides comprised in those situations.

Q. What types of situations were those?

A. I would have to refer to the notes, if I may. Mostly they were generic situations—excuse me.

THE COURT: Any notes referred to must be marked for identification and may be inspected by opposing counsel.

MR. MONTBACH: Yes, your Honor.

THE COURT: Have the clerk mark the notes.

(Defendant's Exhibit BB and CC were marked for identification)

A. Would you like me to read the check marked situations?

Q. If you can generally tell us what the situations [387] were, the 47.

A. Yes, one example is: "Contras in Nicaragua holding Witness for Peace group and 15 journalists pursuant to orders from"—and here we have the name of the person, etc., etc—"scenes include Contras leading witness people off to boat, walking through forest, etc. Scenes in near small farm house where peasant woman were cooking food, various dramatic

shots of Witness members in state of fear. Scenes on boat. Contras in Chantallas province during peace process. Series documenting the return of Mosquito Indian refugees. Guerrillas walking off with food supplies on patrol. Young Guerrilla being interviewed. Aftermath of battle scene. Charred dead bodies lying on street corner. Bombed out house. Dead Guerrillas. American Green Berets trapped in a hotel."

This is the famous situation in November 1989. I think that about sums it up.

Q. What differentiated those situations from the ones you have chosen, you say you would not be able to use?

A. It's editorial judgment. The others would be probably of considerable interest at the time they were taken but for use now, these pictures are somewhat, like all stock pictures, commodities. So you look at them saying what fits as a generic picture in a textbook or any other book just to illustrate the notion that they are Guerrillas, **[388]** people were killed, etc., etc., etc. and these, in my judgment, fit that bill.

Q. The 47?

A. Yes.

Q. The other ones did not fit that bill?

A. The other ones would be of redundant or of no particular interest.

Q. And you stated that between 50 and $250 would be the price you would pay depending on your budget—

A. Right.

Q. —and the size page it would go on—

A. Correct.

Q. —for the 47 photos. And if you were looking for this type of picture, where would you look for them if you were doing the research yourself?

A. I would look at published material and then, because every editor starts with this kind of photograph or illustration, looks at price, I would start out with the Associated Press, Reuter's, United Press, the wire services which cover these things constantly and have very reasonable prices.

Q. What do you mean by reasonable?

A. I could probably buy any Associated Press picture, and I have, for as big a size use as I want to, for about $65.

[389] THE COURT: Could you do that or do you mean that Time-Life could do that? Do you have to be a member of the Associated Press?

THE WITNESS: No. Absolutely not.

THE COURT: Anyone can go there?

THE WITNESS: Anyone. If you say now, sir, that you are publishing a book and you want to buy this, they are in the business of selling it. You have to be a member of the Associated Press to get the picture taken today by wire photo to you. But once that's done, once the first use is done, it goes into the archives, it's a stock picture and it's available to anybody who wants it.

THE COURT: Thank you.

Q. Go on about your process that you were going through as far as obtaining photographs if you were going to put together a volume.

A. Yes. I would also, because probably my budget wouldn't be big enough to cover all my needs, I would very seriously look at free pictures.

Q. Free pictures?

A. Free pictures.

Q. Where would you obtain these?

A. Free pictures are available, of course, from government sources, whether they be, depending on the subject matter, Department of Defense, national archives, **[390]** etc. Free pictures are available from tourist offices, whether they be in the United States or abroad, embassies, cultural services, airlines.

Q. If you wanted to include pictures of the people, the dramatis personae who were down in Central America at the time, Noriega, Ortega, Arias?

A. Associated Press.

Q. Why?

A. They do this for a living. They take pictures of everything that moves and they have the pictures in every news-

paper that takes pictures. As members of the Associated Press, all these newspapers supply their materials to the AP.

Q. Are the pictures you obtained of sufficient quality to be used in a book?

A. In most cases, yes, certainly. Especially when it's news pictures which we used in the World War II book and others. The Iwo Jima picture is an AP picture.

Q. That is?

A. It is.

Q. It's not a picture that you have to buy rights from a photographer or anything like that?

A. No.

Q. Did you deal with stock houses?

A. Certainly.

[391] Q. And you would deal with stock houses in putting together a book if you needed that type of work?

A. Yes.

Q. And how would you request goods from stock houses, by photographer or by picture subject?

A. By subject matter.

Q. And in your review of Mr. Gasperini's work, have you been able to place a price upon what you would pay for the missing slides?

A. Excuse me, I'm somewhat at a loss.

THE COURT: There's been no objection to the question so your answer is yes I can or no I can't.

Q. Yes or no.

A. I can't. It's too broad. I don't know what you mean.

Q. Would you have purchased all of his 310 slides?

A. No.

Q. So we're back down to the 47 slides you were talking about maximized?

A. Minimum 8, maximum 47. 47 would really duplicate it.

Q. And to you, as a consumer, the other 200 and some odd slides were of no real use?

THE COURT: Is that called a leading question where you come from?

[392] MR. MONTBACH: I withdraw the question.

THE COURT: That's kind of a leading question.

MR. MONTBACH: I have no further questions of this witness, your Honor.

THE COURT: Take a brief recess at this time, members of the jury. Please go into the jury room. You can step down during the recess.

(Recess)

(Jury present)

THE COURT: Okay. Please cross-examine.

MR. S. ABADY: Your Honor 13B and 13D.

THE COURT: The clerk indicates they are not in evidence.

MR. S. ABADY: They were received in evidence yesterday with the testimony of Ms. Kinne.

THE COURT: Hand them to the clerk.

MR. S. ABADY: I can remind your Honor of our colloquy and what you stated as to how they would be received.

THE COURT: 13D was received.

MR. MONTBACH: I think they were admitted.

THE COURT: It's agreed that 13D is in evidence, is that right?

MR. MONTBACH: D and B for a limited purpose.

THE COURT: And I so informed the jury. What [393] about 13B?

MR. MONTBACH: Yes, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. S. ABADY:

Q. Now Mr. De Margitay, in your capacity as a consultant you are aware of the factors used to value photography, isn't that correct, sir?

A. Yes.

Q. And you've suggested that the $1500 minimum industry standard came about because Magnum Photos is the Tiffany of the business and others followed Magnum in using this demand authored by the attorney Howard Squadron. Do you still stand by that position?

A. Yes.

Q. Sir, you've never been a member of the Committee on Valuation of the American Society of Magazine Photographers, have you?

A. Of course not. The American Society of Magazine Photographers—

Q. It's a yes or no question, Mr. De Margitay.

THE COURT: Don't argue.

A.Of course not.

Q.You've never be a member of the committee of evaluation?

[394] A. No.

Q. And you're not familiar with the methodology used by the Committee on Valuation in determining the industry standard, is that correct, sir?

A. Right.

Q. You've never even seen the survey guestionnaire that was presented—

A. Right—

Q. I haven't finished my question—the survey questionnaire that was sent to users in the industry, advertising agencies, publishing companies, stock agencies—

MR. MONTBACH: Objection, your Honor. He's already answered the question.

THE COURT: I think he has answered the question.

Q. You've never seen that document, have you, sir?

THE COURT: Asked and answered.

Q. And Mr. De Margitay, it's true, is it not, that the industry standard is discussed regularly in photographic journalism magazines such as photography magazine, isn't that correct, sir?

MR. MONTBACH: Objection. If he understands the question, sir.

A. I do not understand the question, sir. I specifically deny that there's a standard. I do not [395] understand your definition.

Q. Ever heard the phrase minimum industry standard of $1500?

A. I hear many phrases, sir.

Q. I see.

A. I don't concur with them.

Q. You know what the Picture Agency Council of America is, don't you?

A. Yes, sir.

Q. That represents more than 100 stock agencies in the company.

A. Right.

Q. And it's no accident, is it, that every single stock agency has a delivery memo when it delivers original images to a user?

MR. MONTBACH: Objection.

THE COURT: Sustained as to the argumentative form but he may be asked whether it is true that stock agencies use such a memo.

Q. Isn't that true, sir?

A. Yes.

Q. On every single stock agency's delivery memo there is stated that loss or damage of an original transparency will cost the user a minimum amount of money, the minimum of which is $1500, isn't that true?

[396] MR. MONTBACH: Objection.

THE COURT: If he knows the answer, he can answer.

A. I do not.

Q. Have you ever seen delivery memos from any of these companies?

MR. MONTBACH: Which companies?

Q. Any stock agency?
A. Not in my practice.
Q. Not in your practice. Okay. Now, you were head of a stock agency, weren't you?
A. I was head of a photo agency, yes.
Q. The one you called the Tiffany, isn't that correct?
A. Right, sir.
Q. Magnum Photos. Well, I'll show you what's been admitted in evidence as Exhibit 13B which is a specimen delivery memo from Magnum Photos. Have you seen that document?
A. No, sir. I left Magnum Photos in 1961, 1963.
Q. In 1963, that was before the industry standard Committee on Valuation developed the standard in 1969, isn't that correct?

MR. MONTBACH: Objection.

THE COURT: Overruled.

[397] A. I wouldn't know, sir.

THE COURT: The way the question is asked, it's an argumentative question.

Q. When you left in 1963, the Committee for Valuation and the development of the industry standard didn't exist at the time, isn't that correct, sir?
A. I wouldn't know, sir.
Q. Well, do you still regard Magnum photos as the Tiffany of stock agencies? .
A. I do not concur with the word stock agency, which is putting it down. But I do concur that it is the premier agency in the world, yes.

Q. I ask you to look again at Exhibit 13B and isn't it true, sir, that in paragraph 2, Magnum Photos, the Tiffany of agencies for photographers, demands $1500?
A. Yes.
Q. That's true, is it not?
A. Yes, it is true.
Q. Now, you worked for a long time for Time-Warner, isn't that correct?

THE COURT: Argumentative question. You may ask him how many years.

Q. You worked many years for Time?
A. Yes, indeed.

THE COURT: That's a meaningless question.

[398] What's many years. If you care how long, ask him how long. It's just an argumentative, hectoring guestion. You worked a long time for Time Warner.

MR. S. ABADY: Your Honor is correct.

THE COURT: Just make it simple.

Q. How many years did you work for Time, sir?
A. From 19—I was on salary from 1963 to, excuse me, allow me to refresh my memory here exactly, to 1975.
Q. More than a decade, isn't that correct, sir?
A. Yes.
Q. And Time, as you testified earlier, what you would obtain for a lost or damaged transparency would depend on several factors including your clout, isn't that correct?
A. Correct.
Q. And part of the reason you would have clout at Time is because Time itself is a major user and therefore has tremendous clout, isn't that correct, sir?
A. Correct.
Q. So as an entity with major clout, that is the whole Time empire which represents the source of business for so many photographers in so many magazines all over the world, Time doesn't need to bargain with photographers as to or stock

agencies for lost transparancies, isn't that correct? They have that clout from their buying power?

A. I would imagine so.

[399] Q. Sports Illustrated is part of Time, isn't it?

A. Yes.

Q. I'll show you what's been admitted into evidence as Plaintiff's Exhibit 13D. Isn't it true that Sports Illustrated also demands of an user that an user pay $1500 as a minimum for a lost or damaged transparency?

MR. MONTBACH: Object to the use of the word demand, your Honor.

A. So it states here.

THE COURT: He's already answered. He doesn't want to wait for you to object.

Q. So obviously Time Magazine or obviously Time —

MR. MONTBACH: Objection.

MR. S. ABADY: I withdraw.

THE COURT: Anything that starts off like that has to be an argumentative question.

Q. Isn't it true, notwithstanding Time Inc.'s clout, it still demands that if a user loses one of its photographs from its stock for sports pictures, $1500 as a minimum must be paid, isn't that correct, sir?

A. So you've just shown me, sir.

Q. And you've never seen that before?

A. No.

Q. But you claim to be an expert in matters involving Time?

[400] MR. MONTBACH: Objection.

THE COURT: Sustained. Argumentative.

Q. Mr. De Margitay, when you made those coffee table books that you have in front of us here, you said that you purchased the pictures and orchestrated the project in order to

select the pictures published in those books, did you look at them first?

A. Certainly.

Q. How many pictures are in the book on the Kennedys?

A. Good lord, many thousands. I'm sorry, sir, I'm not prepared to advance a figure.

Q. How many pictures did you look at to select those many thousands?

A. I would imagine that we probably, my colleagues and I we probably looked at 50 pictures for every single picture that went into the book.

Q. 50 to 1.

A. Maybe more. I'm not quantifying.

Q. We'll take your figure. What about the Life History of World War II. How many pictures are in that book?

A. I do not know.

Q. Would it be fair to say that you looked at 50 pictures for every one that you select?

[401] A. Maybe yes, maybe no.

Q. Give or take. Was it more than ten?

A. Sir, we spent two years in making the selection of those pictures.

Q. And you looked at many pictures?

A. Of course.

Q. Now you didn't publish those books—withdrawn. In order to select those pictures, you looked at pictures to select those pictures, isn't that correct?

A. Right.

Q. You didn't look at written descriptions of question.

A. At times we looked at catalogs.

Q. Yes or no, Mr. De Margitay.

A. Yes.

Q. You didn't look at a written description?

A. Yes.

MR. MONTBACH: Objection. He just answered the question.

THE COURT: Wait. Number one, give him time to finish his question.

THE WITNESS: Sorry, sir.

THE COURT: It might not hurt to give the defendant's attorney a chance to object to the question. And let's proceed as rapidly as we can but not in a **[402]** confusing manner.

MR. S. ABADY: Yes, your Honor.

Q. You didn't look at written descriptions, isn't that correct, sir?

A. I did.

Q. But you never saw any of the 310 slides by Mr. Gasperini which were lost by Center—

A. No, of course not.

Q. Now, Mr. De Margitay, you don't sit on the legal committee of the American Society of Picture Professionals, do you?

A. No.

Q. In fact, you don't sit on the legal committee or the valuation committee of any professional photographic organization?

A. Correct.

Q. And Mr. De Margitay, isn't it true that the value of a photograph for Mr. Gasperini or any other photographer extends over the lifetime of the photographer plus 50 years after his death?

A. No.

Q. Isn't that the copyright?

A. Yes. Sir, you used value. Copyright, yes. Value is a different term than copyright as I do not need to tell you, sir, you're the attorney.

[403] THE COURT: Don't argue with the lawyer. Just answer the questions as truthfully and as simply as you can do so.

Q. And Mr. De Margitay, isn't it true that the ability for a picture to generate income to its owner, in this case the photographer, extends over the owner's lifetime—

A. Absolutely.

Q.—and 50 years beyond his death.

A. Yes.

Q. Mr. Gasperini is 39 years old. That means that his pictures have a value for the next 94 years, isn't that correct, sir?

MR. MONTBACH: Objection. He's testifying.

THE COURT: It's kind of a convoluted question but he can be asked whether the pictures have value for that period of time.

Q. His pictures, if sold, would generate revenue for the next 94 years, isn't that correct, sir?

A. If so sold, yes.

Q. 94 years. Now, you've testified—

THE COURT: Whatever he testified we already heard.

Q. And the value from those pictures comes, or from any picture, comes from the owner's right for royalties when **[404]** the picture is reproduced by a user, isn't that correct, sir?

A. Correct.

Q. Now, you mentioned—

THE COURT: Whatever he mentioned the jurors did hear.

Q. Now, as to the famous situation when the Green Berets were trapped in the Sheraton Hotel, there weren't any other journalists that got the shots that Mr. Gasperini got at the time, were there?

A. I don't know that.

Q. You don't know that there were, do you, sir?

A. I do not, sir.

Q. And one of the ways in which pictures are valued, that is the valuation criteria, includes the uniqueness of the photograph?

A. Absolutely.

Q. And another criterion is how the photograph relates to a body of work, of many photographs, isn't that true, sir?

A. Not necessarily.

Q. Have you ever studied anything about the valuation of photography?

A. I'm only a humble buyer of photography, sir.

Q. So you have no expertise in valuation of [405] photography?

A. I set the value. The value, sir, is what I'm willing to pay. The value of your house is not what you say it is, sir, it is what somebody is willing to pay for it.

Q. I see. Now, finally Mr. De Margitay, you said that if you were writing a book on Central America, a picture book like one of these coffee table sized picture books, you would look for free photographs from government sources and the AP.

Now, two questions: You have no expertise on Central America, do you?

A. No, sir.

Q. You know nothing about the history of the region, isn't that correct?

A. No.

Q. You never lived in Central America, have you?

A. No, I haven't.

Q. Do you speak the language?

A. No, sir.

Q. You don't speak Spanish.

A. I don't speak Latin either and I know a lot about Roman culture, sir.

Q. We're not talking about that —

MR. MONTBACH: Objection.

THE COURT: Please don't argue with the witness.

[406] THE WITNESS: I'm sorry.

THE COURT: Just frame the next question.

MR. S. ABADY: Yes, your Honor.

Q. You think a photographer's eye and his knowledge of the region or the indigenous peoples being photographed has anything to do with valuation of his or her photography?

A. Of course.

Q. Isn't it true, Mr. De Margitay, that most AP pictures of the type you mentioned are shot in black and white for wire transfer to newspapers? Isn't it true, sir?

A. Most, yes.

Q. So if you, who have no knowledge of the subject, were writing a picture book on Central America and you sought to use these $65 a piece pictures from AP, those would all be black and white pictures, isn't that true, sir?

A. No, sir.

Q. Isn't it true—didn't you just testify that most AP pictures are black and white?

A. Yes, sir. But if I want color pictures, I get color pictures.

Q. We're talking in this case about exclusively color transparancies, isn't that correct, sir?

A. Right, sure.

Q. Now, some pictures have no value for long periods of time and then gain value as news events or even [407] advertising changes—

A. Absolutely.

Q. —come to the fore, isn't that correct, sir?

A. Yes.

Q. Some pictures, particularly about historical events, have recurring value as a story becomes current in the news, isn't that correct, sir?

A. Correct.

Q. And historical pictures can be used in many different contexts, isn't that true?

A. Correct.

Q. They can be used in textbooks, isn't that true?

A. Sure.

Q. They can be used in educational videos, isn't that correct?

A. Right.

Q. They can be used in magazines?

A. Um-hmm.

THE COURT: No um-hmm. No good. Yes or no.

A. Yes, sorry, sir.

Q. They can be used in newspapers and they can be used in books such as the book you have there, isn't that correct?

A. Yes, sir.

Q. You're familiar with the photojournalist Margaret [408] Burke-White, are you not?

A. Very much, sir.

Q. She's one of the most famous photojournalists ever, is that correct?

A. Yes.

Q. And she worked for Time-Life?

A. Yes.

Q. And in her career as photojournalist, she wrote books about each stage of her career, isn't that correct?

A. Yes.

Q. When she took pictures of starving Americans during the Dust Bowl Era that was a book?

A. Absolutely.

Q. When she took pictures of the developing industry under Stalin, that was a book?

A. Yes.

Q. When she took pictures of the Indian independence movement, that was a book in the late 1940s, isn't that correct?

A. Yes.

Q. Were you ever informed by counsel for the defendant that Mr. Gasperini also intended to write a book, a retrospective synthesizing his years of experience in Central America?

A. Yes.

[409] MR. S. ABADY: I have no further questions, Judge.

THE COURT: Any redirect examination?

MR. MONTBACH: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. MONTBACH:

Q. Mr. De Margitay, having reviewed the slides of Mr. Gasperini's in his counsel's office, the listing of slides and the video, do you have an opinion as to whether the 310 missing slides each have an individual value of $1500?

A. Yes.

Q. What is your opinion?

A. They are not.

Q. Why not?

A. Because the subject matter is so general that whereas when he took these pictures they could have been agented to his profit, at this point in time commercially they are competing with readily available, extremely inexpensive photographs.

Q. You have stated your opinion of the value of the 47 slides on the list. Do you have an opinion as to whether the remaining 263 slides have any commercial value?

A. Yes.

Q. What is your opinion?

[410] A. Very, very little.

Q. What do you mean by very, very little?

A. You want me to put a dollar value on it?

Q. If you could.

A. If an agent, would be very lucky, I would say over a period of ten years, maybe $150 or $200.

Q. Per slide?

A. Per picture, yes.

Q. Counsel used the term—

THE COURT: Whatever he used they heard.

MR. MONTBACH: I have to use the word, your Honor.

THE COURT: Ask him if he understands the meaning of the word X.

Q. Do you understand in the context of slides being sold if they "would" generate a certain amount of money as opposed to "could" generate?

A. Right.

Q. Were you responding if these were sold they could possibly generate money, not positively they would.

A. Indeed. It's possible but not probable.

MR. MONTBACH: Thank you. No further questions.

THE COURT: Anything else for the witness?

MR. S. ABADY: Yes, your Honor.

[411] RECROSS-EXAMINATION

BY MR. S. ABADY:

Q. Mr. De Margitay, for those slides you wouldn't choose of Mr. Gasperini's to put in your hypothetical book on Central America, you say those are worth about $200 apiece. Isn't it true, sir, that you previously testified here today that you paid up to $350 for one time use of photographs, general photography?

A. May I be allowed to clarify?

Q. Did you say that, yes or no.

A. Yes.

Q. So we're talking about a one-time use. Is it your testimony, sir, that the $200 for the slides that you determined to be of little value is the revenue that would be potentially generated over the next 94 years?

MR. MONTBACH: Objection.

Q. Is that your testimony?

THE COURT: Overruled.

A. Yes.

Q. Over the next 94 years you are saying, you are prognosticating that the subject matter of Central America in Mr. Gasperini's slides would only be used one time in video educational films, magazines, games, is that correct, sir?

A. Yes.

[412] Q. How much are you being paid for your testimony here today?

MR. MONTBACH: Objection.

THE COURT: Overruled.

A. My rate, sir, if you ever want to use me, is $100 an hour.

Q. $100 an hour. How many hours have you worked for the defendant's law firm on this matter?

A. I think five hours so far. Not including the court.

Q. Have you ever worked for that law firm before?

A. Several years ago in one instance.

Q. This is your second employment by them?

A. Yes, sir.

MR. S. ABADY: No further questions.

THE COURT: Anything else for the gentleman?

MR. MONTBACH: Nothing else, your Honor.

THE COURT: Thank you, Mr. De Margitay, you're excused. indulgence.

THE WITNESS: Thank you, sir. Thank you for your indulgence.

(Witness excused)

THE COURT: You don't need those books. They're just ordinary books you'd have on a coffee table published by Life Magazine.

[413] THE WITNESS: Little Brown, actually.

THE COURT: All right.

MR. MONTBACH: No further witnesses.

MR. S. ABADY: Nothing from the plaintiff, your Honor.

MR. MONTBACH: The defendant rests.

THE COURT: All right. Members of the jury, please step into the jury room for a moment. Keep an open mind and don't discuss the case.

(Jury not present)

THE COURT: The record will show that both attorneys are deemed to have made all motions permitted by the rules and the court has either denied or reserved decision as to all such motions.

MR. S. ABADY: Except, your Honor, you granted the Rule 50(a)(2) motion on liability.

THE COURT: That's never been an issue except maybe in your mind. The only thing the jury has to do is figure the value. The court instruct them generally on their duty in determining credibility and the like, and damages they are to compensate and make the plaintiff whole to the extent that money can do so for his loss, and they can't be the subject of speculation, they have to determine them after due deliberation based on the evidence and they can't be arbitrary, they have to use sound discretion and **[414]** not consider speculation or sympathy or anything like that.

The court will tell them that they may take into consideration fair market value of the property loss, the time and place of the loss, and that's the price which a fully informed and willing owner under no compulsion to sell would have voluntarily sold, and a fully informed buyer, under no compulsion to buy, would have voluntarily paid for all the rights of the owner in the 310 slides which are lost.

And I will tell them in considering market value, they may consider all of the facts in the case in evidence, without limiting the scope of that; they can consider the ability of the photojournalist and his reputation; his prior licensing fees collected from his pictures; the extent and nature of his efforts to exploit these pictures and other pictures; the content and subject matter; the potential competitive or alternative sources of pictures available to users; the nature of the demand for the use of the pictures.

They may discount their damage award for the length of time it would take to sell or otherwise dispose of the transparancies. They may reduce the value for the cost of merchandising either by a stock agency or any other ordinary business means which they find to be reasonable.

The court has already given a cautionary instruction on the so-called industry standard. I will tell **[415]** them that it's not applicable in this case because there is no delivery ticket incorporating such a provision. They can consider what others do as they find from the testimony for whatever evidence or whatever assistance it gives them in reaching their conclusion.

As to anything requested in writing which is not given in substance, each of you have a preserved exception without the need of taking it again. But that's a general indication to aid you in your closing arguments of what the court intends to tell the jurors.

Now, is there any problem or any open issue which you want me to address at this time on the subject of the jury instructions?

MR. S. ABADY: Yes, your Honor, two issues. One, we would request the court also instruct the jury that independent of market value, that the slides have an intrinsic value; that they may take into account the meaning of the loss to Mr. Gasperini in light of his life plans, in light of the efforts that he went to to obtain the pictures.

THE COURT: I will include his possible use of the slides in a book as one of the items that they may consider. But on the rest of it, I decline to charge and you may have an exception as to that. The court views this case as a commercial transaction between a publisher and a photojournalist and that these slides, as stated by one of **[416]** the witnesses, are essentially a commodity, and while it's very unfortunate that they got lost, they have no intrinsic value apart from the money that can be derived from them over their life as a property.

MR. S. ABADY: Will you instruct the jurors also that in making that calculation they should take into account that the value is over the lifetime of the copyright, Mr. Gasperini being 39 years old.

THE COURT: They've already heard that. I don't have to tell them that. But I will tell them the life of the copyright.

MR. S. ABADY: And the second issue, which I forecasted to some extent in my requested instruction submitted to you, has to do with the fact—

THE COURT: I want to make it clear that I'm clear on the intrinsic value. This case is distinguished from the case where Aunt Tillie's picture is lost by the moving van and where the

picture has no value except to the family. This is a commercial transaction, and that's why I'm differentiating those cases.

MR. S. ABADY: I accept your understanding, your Honor. I'm also asking you, your Honor, to give an instruction, which I believe I included in my requested instructions, but let me just go to it and then I'll see—

THE COURT: Just give me the subject matter that [417] you want covered.

MR. S. ABADY: The defendant was in a position to produce documents in its files and produced only the front pages of critical documents, thereby hiding the fact that it had in its possession the knowledge over a period of years, through its course of dealing with various stock agencies, its knowledge of the industry standard.

THE COURT: I decline to so charge.

MR. S. ABADY: I would like an instruction to the jury that where a defendant, where subpoenaed material was not produced and the defendant was in the best position to produce that material, they may draw an adverse inference from the failure to produce the material.

THE COURT: Declined in the context of this case. The court believes that you've had a full and fair opportunity to present to the jury all of the elements which pertain to the value of your lost property. That would be an unduly prejudicial and unfair instruction in the context of this case and it's declined. Are you otherwise okay?

MR. S. ABADY: I believe I am, your Honor.

THE COURT: Did you have anything?

MR. MONTBACH: No, your Honor. You already dealt with the industry standard.

THE COURT: Industry standard is a little difficult because as the proof developed in this case, [418] there's really far less evidence that the industry standard exists except for certain lower court New York State cases. Every one of those cases is distinguishable on the ground that in those cases, where recovery was allowed based on the industry standard, they signed for or received the delivery ticket and the delivery ticket by the conditions on the back of it became the contract of the parties rather than an industry standard.

So hindsight, the court probably would have been better off to have excluded it. But in any event, it's clear that this plaintiff didn't send the delivery ticket. And the parties never agreed to be bound by the industry standard.

It does show the existence of this provision and its history, which has been fully gone into with the witnesses, does show that the stock agencies recognize that every print has some value and that the value is hard to determine. I don't know that that adds much to the case.

MR. S. ABADY: Your Honor recalls the testimony of Mrs. Kinne that in fact throughout the industry in almost all cases the industry standard is observed.

THE COURT: But it's not. It's a basis to start the chiseling. It's all a negotiation. The testimony is clear on that. This plaintiff did not pay the full amount last time it lost slides and the last witness gave very [419] believable testimony that the good will existing between the parties, the so-called clout of the customer or other extraneous factor is just honored in the breach.

MR. MONTBACH: And your Honor—can I please make a statement here.

MR. S. ABADY: If interruption is going to be the rule of the day, make your statement.

MR. MONTBACH: We have presented you with appellate level decisions from New York State courts which say there is no industry standard of $1500, no custom and practice, that you have to look to the uniqueness of the slides and the earning power of the photographer.

THE COURT: But it's an issue of fact.

MR. MONTBACH: I think it's an issue of law.

THE COURT: It's an issue of fact whether an industry standard exists. But the evidence in this case is very clear that there is no industry standard. And if there were, these parties did not agree to be bound by it.

MR. MONTBACH: Certainly, your Honor.

THE COURT: I think I decline to tell the jury that.

MR. MONTBACH: We think it will prejudice the jury.

MR. S. ABADY: Mrs. Kinne's testimony, I think you'll recall, which the jurors can infer from the other **[420]** testimony, that since Mr. Gasperini did not transmit these slides to the defendant but went there, got paid separately to work with them and edit them, that there would be no need to in effect send a delivery memo to himself and the only reason he left them there was because he was called away to the Persian Gulf and because he's not a lawyer and not a sophisticated guy he didn't think, legally, wait, I'm leaving—

THE COURT: The law is the same for people who are not sophisticated.

MR. S. ABADY: They still have possession of my property. I better get them to sign a liquidated damages clause.

THE COURT: He didn't. Are we covered now on this?

MR. MONTBACH: Nothing further.

THE COURT: How long will your summation be?

MR. MONTBACH: Ten minutes.

THE COURT: And yours?

MR. S. ABADY: 20, 25 minutes, your Honor.

THE COURT: All right. Well I think my problem is that I will have to leave for Manhattan in about 45 minutes. What I propose to do, I'll go down there, I'll probably come back here by 2:30 or 2:45. I think what I would like to do is to hear the closing arguments while I'm **[421]** here and presiding.

Then I propose to have the clerk, in your presence, in open court, simply play the videotape which is in evidence, Exhibit 10. And then send the jurors to lunch.

I don't know how long the videotape runs.

MR. S. ABADY: The three videotapes are 20 minutes apiece.

THE COURT: That's about 60 minutes.

MR. S. ABADY: The total is 45 minutes, I'm sorry. What is the purpose? It's not adverse to our case, but what's the purpose of playing the videotapes?

THE COURT: What's the purpose of offering it in evidence? You see, if it's in evidence, an appellate court reviewing the case has the right to assume they saw it. I would ordinarily play it in open court in my presence but there's a meeting of the judges. If you want me to send them for a two and a half hour lunch, I can't see how that's in your interests. Can't you both sit here and be quiet while it's played.

MR. S. ABADY: In the interest of time we could even dispense with the playing.

THE COURT: Then you'll withdraw it as evidence.

MR. MONTBACH: I would like to see it played.

THE COURT: I would think so. It was offered as some good faith evidence to help them value the slides **[422]** because some of the slides are on the videotape. I don't now why, it astounds me that you would offer an exhibit and then not insist that the jurors see it. And they can't very well see it in the jury room without a projector.

MR. S. ABADY: It was the fact of its manufacture that was significant, not the content.

THE COURT: They're trying to assess, I assume, the value and quality of 310 pictures.

MR. S. ABADY: Which you cannot do from video tapes which is why we mounted photographs in Exhibit 18.

THE COURT: I think it's in evidence now and I think I ought to play it.

MR. S. ABADY: As you wish, Judge.

THE COURT: I just propose to telescope the time by going to New York while it's played and I assume none of you have any objection to that and you'll both maintain cordiality in my absence.

MR. S. ABADY: Absolutely, Judge.

THE COURT: All right with you, Mr. Montbach?

MR. MONTBACH: Yes.

THE COURT: Thank you, all.

(Recess)

(Jury present)

THE COURT: Members of the jury, let me tell you about scheduling.

[423] As soon as I finish speaking, you'll hear the closing arguments of the attorneys. As I mentioned earlier, that's not evidence. It's in the same vein as the opening statements.

The attorneys will discuss the evidence that been received and argue the basis for drawing certain inferences from the evidence and will ask you to reach certain conclusions as jurors. Because the plaintiff has the burden of proof on the issue of damages in this case, the plaintiff has the right to open and close and therefore the defendant's attorney will go first in the closing arguments.

After the closing arguments, the court is required to be in Foley Square for the monthly meeting of the court. I'm going to go down there and come right back as quickly as I can. But to make the time work out better for all of us, it's been agreed that these videotapes which are in evidence, Exhibit 10, will be played for you here by the clerk in open court. You won't be able to view them in the jury room and one of the things that you do in jury deliberation is to look at the exhibits and consider them.

So the clerk will play the videotapes for you in open court. The rest of the exhibits you'll have with you in the jury room when you deliberate.

As soon as the tapes have been played, the lawyers will be here but nobody is to say anything. You're [424] just looking at the tapes. No comment by anybody. And you shouldn't say anything to each other while you're watching the tapes.

As soon as Ms. Bravato is finished playing the tapes, she will excuse you for lunch and you will come back to the jury room at 2:30 and at that time I'll give you the court's instructions as to the law. So when you come back from lunch you're still under the instruction of the court not to discuss the case and keep an open mind until you hear the court's instructions as to the law. And then and only then you'll deliberate on your verdict.

Do you all understand what I've just said? Is there any problem with any of that?

All right, Mr. Montbach.

MR. MONTBACH: Thank you, your Honor.

At the outset of the trial of this case I asked to listen to all the testimony and to apply your common sense to it in order to determine the amount of compensation which may possibly be due to Mr. Gasperini for the loss of his slides. At that time, I stated to you that we would show by expert testimony that the market value of the slides was significantly lower than the amount being sought by the plaintiff in this case, certainly nowhere near the million and a half being sought in the complaint.

We have done so and I submit that plaintiff has [425] not introduced any credible evidence to counter the evidence produced to you by Mr. De Margitay concerning the salability, the commercial value of the 310 slides which are missing.

You've been presented with two choices. Mr. Gasperini's witnesses would have you believe that each and every one of the 310 missing slides had a minimum value of $1500, no matter what they depicted, no matter what the market was for them and no matter how many other photographers took pic-

tures of the same scenes and have those available in the marketplace for use. It's just not logical, ladies and gentlemen.

Mr. Gasperini himself testified he had no intention of even attempting to earn any money from these photographs. He was keeping them in his mother's house in cardboard boxes, he was not trying to earn any money from them because he wanted to use them at some unknown time in the future to write a book about his own experiences.

That book may have been very interesting. We have no testimony as to whether there's a demand for such a book, as to how many pictures would be in such a book, as to how much it would cost to make such a book or how much — in fact, there was testimony that no one had ever approached him other than friends who said he ought to write a book about his experiences. It may be very interesting.

[426] We had testimony, counsel asked about a certain photographer, Margaret Burke-White. I don't know if you know of her. I do. She is a very infamous photographer, one of the best in the world.

Mr. Gasperini is, we admit, a credible photographer. But he is not a Margaret Burke-White. I may be killing her name, I'm sorry, if I am. Mr. Gasperini wants you to believe that with 4700 some odd pictures still in his collection, he cannot write that book or if he can write that book that he can't use those pictures that he has or get pictures that would illustrate what happened when he was down in Central America at the same time.

You also have heard a lot about perspective things in the future, possible CD ROM uses, possible high technology uses. We don't know what they are. We're having speculation as to what may be in the future. What would have happened if the slides hadn't been lost.

We have a measure of that here. Obviously if they would have been returned in 1991, Mr. Gasperini would have already missed the prime earning years. In the 80s and early 90s, that was when news of what was happening in Central America was in the forefront. Yet he chose to keep his pictures in the closet.

If he had those 310, what would he have done. His own testimony is he would have had them in the closet. **[427]** They would not have earned him any money.

Now by your own common sense you know that there's no real demand. Mr. De Margitay said it. There's no real demand for these kinds of pictures. Central America is old news. It's not D-Day. We're coming up to the 10th anniversary of many things that happened in Central America. Do we see a big demand of things that happened to the Mosquito Indians or the Witness for Peace. No. There's certainly no retrospective calling for his slides to be used over and over again.

During the years before 1991 Mr. Gasperini chose to his own reason not to market his slides. That's his choice. During those years he earned an average of less than a thousand dollars a year from the sale of his photos to Central America. In fact most of the money, as you heard, came from our organization. From other organizations I think the most he ever got was $2,000 for a CD ROM video game. Other than that he was earning approximately 2 to $3000 a year from his photography. Yet he and his experts would have you believe these slides are worth a minimum of $450,000.

It's not logical. Probably the best indicator of what the slides are worth is proven by the earnings he has received from the slides of the Gulf War that he did place with a stock agency, Impact Visuals, one of the agencies **[428]** that says it's worth $1500 each. They also did an edit. He testified that his brother gave the slides from the Gulf War to these individuals. They edited them down to almost the same number of slides that *were* given to Guidance associates. I think his testimony was around 240, 250 slides are still with Impact Visuals of the Gulf War situation.

Those best slides, just like the 310 that he gave to us supposedly, over the past years have earned him a total of $366. Of those 240, 250 slides only seven slides have ever been able to be sold to anyone and none of them have repeated.

The average, you'll be able to figure it out, of his earnings from that, not what they charged, the average he earned is about $50 a picture. About the same price that he got when he

sold these pictures originally to In These Times magazine and the other people.

His own testimony was that they sold him $50 a picture. And those pictures which are out in the public domain people can look at. For pictures like Witness for Peace, Mosquito Indians, he's never had anybody get in touch with him through the papers or anyone else to use them. There is no demand.

Remember if the tree falls in the forest, that nobody is there to hear it, does it make a noise. If he's **[429]** got 310 slides which are pretty good in the closet and they don't have any sales are they worth really very much at all. It's a very speculative thing.

Using the $50 rate that he has accomplished or was used to earning over the last ten years for the use of his slides, if you multiplied that by the 310 slides that were missing generously he would earning $15,000. That's what the value of those would be. If you say that half of those again were reused at another $50 a picture, you add on another $7,000 or so, maybe he would earn, they would have a value of around 20, $22,000. A figure which is over twice the amount he has earned in his life from all his Central American pictures.

If added up, and I did, the figures that he gave for his earnings from Central American pictures, including the money he received from Guidance Associates, including the $3500 payment that was not called for in the contract but was made by Guidance Associates out of a feeling of responsibility because he put a lot of money into it and it was not earning very much money for him, his earnings over the last decade are under $10,000 from his photography.

Yet he would have you give him $450,000 from the loss of those 310 slides. It's like winning the lottery. Those slides seem to be worth more lost than they would be if they hadn't been lost.

[430] In fact, we have produced here, in evidence, and you can look at it, his own count, a hundred slides that are duplicates of what was given to Guidance Associates. Those are available today.

MR. S. ABADY: Objection, your Honor.

THE COURT: I'm sorry.

MR. S. ABADY: Objection.

THE COURT: The juror's recollection of whatever the evidence shows controls.

MR. MONTBACH: Those are available to him. Now, we had two experts here, or two main experts. There were some other people testifying who maybe characterized by the plaintiff as expert testimony. Ms. Kinne, who makes a habit of testifying. I think she testified that she has been in at least 70 cases. She's a professional witness on behalf of photographers.

She testified that the only value that she could think of for those pictures was this knee jerk $1500 for each and every one of them despite the fact, and she based on the fact in her testimony that Mr. Gasperini did the edit and this made these 310 pictures or 300 pictures, we should get these two separate here, 300 pictures special and worth $1500, and the fact that the other ten, which were edited by Mr. Gasperini's mother, or chosen, she still says those are worth $1500 each. She doesn't know what they're of but just **[431]** because they were taken and they're involved in this case.

Mr. De Margitay, however, who has a vast experience in buying pictures, and knows the marketplace, gave you a true picture of the commercial value of the slides. He didn't say they were all totally worthless. We're not making that argument to you. We wouldn't. We'd be foolish to do that.

He said reviewing the slides, reviewing the videos, reviewing the 4700 some odd slides that were shown to us and reviewing the list of the 310 or 300 that are on that list, 10 are not described, 300, he saw eight separate scenes, if you will, of which there were 47 pictures, that he could see as having a commercial value to be used in a book, by any magazines, newspapers, whatever. And he said the high price that he would pay for those, if he had a good budget, was $250. In all likelihood, and obviously you're going to negotiate it down when you want to get something depending on your budget, 50 to $100.

With regard to the remaining 263, he said they virtually had no commercial value. They could be obtained anywhere. There were plenty of sources for $50 or less that you can get those.

Not denigrating Mr. Gasperini's pictures, his ability or anything. The fact remains as you know and as the court has says, there were dozens, hundreds of [432] photographers down there. You saw the newspapers. On a daily basis there were pictures. We have National Geographic with pictures down there. You heard the name James Nachtway, a recognized award-winning photographer was down there taking pictures. Those are available.

Mr. Gasperini's pictures are in his mother's home. They were never out there. They may have had a value, they don't have one now and they certainly weren't buying merchandised.

I ask you in closing, please don't speculate. Use your common sense. It's a shame that the slides were lost. No one meant to lose them. This is not a question of our trying to get rid of his slides or anything like that, we just feel he should have a just compensation given his earning power. It's our position that those slides were not unique. Some could be used. Most couldn't. Unfortunately by his own choosing Mr. Gasperini has not determined any significant earning power. He has been paid 50 to 100 a slid for a few of his slides, but he certainly is not in the range of $1500 per slide for every picture he takes.

Thank you, very much.

THE COURT: Thank you, sir. At this time Mr. Abady you may make a closing argument on behalf of Mr. Gasperini.

MR. S. ABADY: Thank you, your Honor. Ladies and [433] gentlemen of the jury, on behalf of Mr. Gasperini first I wish to thank you for your patience and attention in this matter. As this Mr. Abady told you in the opening statement, this case is very important to Mr. Gasperini. It's very important because seven years of his life's work, seven years of his living abroad, seven years of working and living in a country

whose language he trained for and in which he wrote for foreign press as well as writing in English, seven years in which he captured the images of civil war and its impact on families, on children, on poor people in the region, on politics, seven years in which Mr. Gasperini at times even risked his life and saw the death of one of his colleagues, seven years in which he hoped to synthesize into, for him, a definitive work in pictures on the history of Central America, seven years is now gone.

We ask you to think first of all what it would mean to you to work that long and that hard with the dedication and the sacrifice that Mr. Gasperini invested and to lose all of that because a company, which is in the business of using photography, which since 1961 made millions of dollars exploiting still shots, slides and negatives for its business, primarily the making of educational film strips, a company which has in its own stock 10,000 of such slides, that a company according to its [434] president had no policies or procedures for safeguarding seven years of Mr. Gasperini's life, a company which was utterly cavalier in the handling—

THE COURT: Talk about the value. The case is limited to the value. The verdict is not being given to punish anybody for being cavalier. Just talk about the value of the lost slides.

MR. S. ABADY: I am, your Honor. This is a part of it.

Ladies and gentlemen of the jury, in his opening Mr. Montbach was saying, said to you that he did not deny Mr. Gasperini's pictures are good or that he should not be compensated. In his closing he's telling you well, compensation may be due. What happened to the equivocation, how did his case suddenly change from beginning to end?

Well, he said to you in his closing that our evidence was not credible. I'd like to review that evidence with you. What do we know and how can we determine the value here.

Well, the best way we can determine value is not simply by what Mr. Gasperini has done to date, because you heard the undisputed evidence that the copyright, that is his right to earn from his lost photographs, extends 50 years beyond the

time of his death. That's 94 years. The potential reproduction of his work can last for the next 94 [435] years. Now, the witness De Margitay, and recapitulated in the closing of Mr. Montbach said well, look at what Mr. Gasperini has done to date. To date Mr. Gasperini is only 39 years old. To date Mr. Gasperini had not had the chance to write and will now never have the chance to write his book on Central America. And to date we know from the testimony of the witnesses that photography has recurrent value as was admitted by the defendant and as we saw from the testimony of Mr. Bob Zentmaier who owns Photo Researchers Inc., a company that has more than a million original slides in its inventory, there were pictures in that inventory 50 years old that-were suddenly on the front pages of newspapers and in magazine feature articles showing ordinary GIs landing on Omaha Beach on D-Day.

That's the nature of photojournalism. It has a recurring value and the value recurs precisely as history and events change, and as those changes are recorded in the media, in textbooks, new technologies.

I was interested to see Mr. Montbach say that we speculated on the technology such as CD ROM use that may have value for Mr. Gasperini. That was no speculation. Sitting on that table in front of you are two packages of software, two packages of software for which he was paid several thousand dollars. So that's not speculation either.

[436] Ladies and gentlemen, one good way to determine the value of these photographs is what the defendant knew about their value. Mr. Gasperini is a photojournalist. But the defendant is an user of photographs. And only until the very recent years where it used photographs and videotapes, all of its product was from photographs, was from photography. The defendant was a major player in the business, a major consumer of this kind of goods.

And what did the defendant do? Mr. Goodman searched high and low. He had every single person of a 40 member staff search his entire premises to find these photographs. He searched his storage facilities. He temporized and delayed in even informing Mr. Gasperini or his mother that they were

actually lost but admitted on the witness stand that the earliest date of the loss was August of 1991 and the judge will instruct you as to the significance of fixing a date as to any interest that may be due.

THE COURT: That will be done by the court. That's not a matter for the jury. The jurors don't need to concern yourself with the date.

MR. S. ABADY: Thank you, Judge. So he admitted that he knew of this loss in August of 1991 and yet it was never definitively conveyed to Mr. Gasperini until the letter dated December 15, 1992.

[437] Now, why would the defendant wait a year and a half before admitting that this property was lost?

MR. MONTBACH: Objection.

MR. S. ABADY: Because the defendant knew that it was valuable.

THE COURT: He's making an argument that he knew it was valuable.

MR. MONTBACH: Mischaracterizing the testimony, your Honor.

THE COURT: Well, the jurors' recollection of the testimony is controlling over anything that the lawyers or I might say.

MR. S. ABADY: How did the defendant know it was valuable? Because throughout the photographic industry, there is a minimum industry standard. Now, what does the word standard mean? It means an average. What is the average based on? It's based upon the projected potential use and reproductive royalty generation of any photograph. That's the nature of an average.

Are we saying that each and every one of Mr. Gasperini's photographs, 310, would have generated $1500 and not $1499 or $1501? No. It's an average.

Some of his photographs may have generated more, a great deal more, over the next 94 years. As Mrs. Kinne told you, a picture of an eagle that sat in stock at Photo [438]

Researchers for years and years and years generated $20,000 simply when the post office used it on the cover of its Express Mail packages.

So an average is based upon potential use which can now never be realized because the defendants lost or destroyed the photographs. That's the whole point of an industry standard.

What the defendant is asking you to do in this case, it's asking you to give it a discount for its own carelessness. What it's telling you is that you cannot take into account its superior knowledge of the industry standard reflected in its own records in dealing with stock agencies, Magnum Photos, Photo Researchers, all of which put the minimum standard on there. That its knowledge of that standard should not apply to Mr. Gasperini because he didn't go to Columbia Business School, he studied rural sociology and when he was suddenly called away to the Gulf War he didn't stop and think: Hmm, these photos which are in my possession at their premises and which I'm editing for the video I must now leave exclusively in their possession and I better get them to sign a clause showing their acceptance of the industry standard which they've known about for years, because otherwise if they lose my property then I won't have that additional contract term to bind them with.

They want you to give them a discount for what [439] would otherwise be expected of them in their dealings what all other commercial agencies that deliver the type of photography that Mr. Gasperini and his colleagues deposit simply because he got called away suddenly to photograph the Gulf War and he's not an experienced businessman like Will Goodman. He's a journalist.

I don't think they're entitled to that discount. I don't think they should be rewarded since they clearly know what is in the industry because of those circumstances.

Mr. Montbach mentioned to you Mr. Gasperini's photography is not like James Nachtway's photography which he published in National Geographic. Who is James Nachtway alone with in Central America taking pictures with? With Bill Gasperini. Who knows quality photography? Well, we have

submitted to you in Exhibits 18, I believe it is A through I, examples of his pictures. Fine quality pictures. They're not the kind of pictures that we as tourists take on vacation. I don't see U.S. helicopters doing food drops in Somalia and capture that dramatic moment. And I'm sure none of you do unless you're very special. I wouldn't have that for posterity or something that I could sell.

Mr. Gasperini's experience is unique. It has to be unique. Most of us don't risk life and limb to record the history of the most important actions of our times in world history. A man who has been everywhere on the globe [440] except Australia and Antarctica and taken pictures.

There's been a theme that Mr. Gasperini has been a photojournalist but he's not really a photographer. Or in the alternative, that he's a photographer and he's got so many pictures he doesn't need this 310 so you shouldn't really compensate him more than the amount suggested by Mr. Mount back. The truth is as Mr. Gasperini and Mrs. Kinne told you and this was not refuted by the defendants' paid outtakes expert, is that outtakes, shots you don't use, the hand is in front of the lens, the subject matter is not the same, makes all the difference in the world.

Mr. De Margitay told you not of outtakes but of pictures submitted for a book, that it was 50 to 1 in the next editing process to put those pictures in a book. If it's 50 pictures, if you discard 49 pictures to find the one that is publishable in a book with thousands of pictures in it like the two coffee tables he had on the witness stand, one of the Kennedys, one of World War II, then Mr. Gasperini's final edit of seven years worth of work among 5,000 photographs where he had 310 select photographs are the pictures that matter. Not the ones that he edited out and would have discarded, and indeed, that a publisher would not use. Magazine, newspaper, textbook and so forth.

And one of the things Mrs. Kinne told you is that [441] she interviewed Mr. Gasperini as to his editing capacity and technique. You edit visual images, the language of visual images in the same way, I should say analogous to the way we

edit words. That you take into account composition and subject matter and so forth and you pick that which is select. And those 310 select images are now lost and cannot realize their value over the next 94 years.

And that is why you use an industry standard. That is why it is an average. That is why it is not contrary to the suggestion of Mr. Montbach that this is a lottery. We have more respect for your intelligence than that. And that is certainly not as Mr. De Margitay said Mr. Gasperini exacting his pound of flesh. Who exacted the pound of flesh here? A photojournalist who makes very little money and travels the world documenting the history of our times or a multimillion dollar defendant corporation.

MR. MONTBACH: Objection.

THE COURT: Well, both parties are to be treated equally by the jurors and their status or wealth is of no moment.

MR. S. ABADY: So you can ignore and should ignore the claim that what Mr. Gasperini is doing here is somehow vindictive or that he is seeking to play a lottery. That is not true. And you are the arbiters of fact as to his personality. You saw this man testify. When you go in **[442]** and you deliberate you should certainly discuss among yourselves well does he seem like a guy who is just looking to use us for a lottery or did he seem like a sincere man, a sincere man who lost something of great personal and market value to him and all we're asking of you. just compensation. That's all we're asking of you.

You buy lottery tickets for the lottery. You spend the time and effort of presenting real issues to the jury to get justice. That's what we're here for. Not a lottery as the defendant said. Maybe that's their cynical attitude, but it's not ours. You heard from Mr. Gasperini and his mother. You have a family context to infer something about his character.

What do we hear from William Ruebler, an award-winning photographer who works with one of the media empires in this country, who employs a thousand photographers, he himself oversees the work of 16 award-winning photographers,

whose own photographs were published in USA Today and in various other magazines and books.

What did he tell you? He said that this man's work is first rate. It is first rate. For those of you who have some knowledge and understanding in evaluating photographic imagery, you'll have examples. Ask yourselves, could you take pictures like that? Your friends. Do they **[443]** have the equipment the experience, the training. Do they get into the situations where they could capture such photographs? And as Mr. Kuebler told you, that excellent photography, remember, could have a value, could have a value over the next 94 years.

Notice, when the defendant testified, Mr. Goodman testified, he testified that for the one-time reproduction use of a single image, the defendant, Guidance Associates, Center for Humanities, has paid between 2 and up to $700 per image.

That means any one of his pictures would only have to sell to an organization like theirs who clearly does business or had done business with Mr. Gasperini twice and yet have $1400 realized from that picture. If it sold three times it would be $2100 and you have evidence in the record of several of his pictures being used on repeated occasions, including his early pictures from 1986 that were published in several publications at the same time.

It all depends. The fact that there were other photographers who may have taken pictures of some events is meaningless. Mr. Gasperini doesn't own the copy rights to those events and we don't know if those photographers developed their film, put it in stock, whether it was accepted. We don't know anything about it.

What we do know is that the quality of his **[444]** photography has been admitted to by the defendant and has been affirmatively demonstrated to you by our expert witnesses, by Mr. Kuebler and by Mrs. Kinne.

What we also, another gentleman we heard from was not an expert witness, not someone who knew anything about Mr. Gasperini but a man who runs a major photo stock agency, Robert Zentmaier. And what did he explain to you.

He explained to you not as a partisan but as someone who was subpoenaed to this court, that everyone in the industry is aware of this standard. That not a single document goes out, excuse me, not a single photograph goes out of his agency without a document that tells major players in the business like the defendant in this case that if you lose it or damage it the average is $1500.

Why? Why do we set the average? Why did the Committee on Valuation back in 1969 bother to ask of people like the defendant and advertising companies and publishing companies and newspaper chains, information of a survey, put in a survey, a large survey as to uses and the lasting value of the photography in order to establish this? Why? Precisely because we will never know the value of these photographs to a certainty over the last 94 years. That's the reason you have a standard. That's what the defendant was fully aware of.

You have in evidence numerous specimen forms that [445] are used by all of these stock agencies. Mrs. Kinne told you every, when I put the question to her, does every single defendant who is a member of the Picture Agency Council of America have a delivery memo that's transmitted with photographs, she said yes. And I asked does everyone have the term minimum value of a lost or damaged slide of $1500. She said no.

Why? Because some were more. The standard goes back to 1969 and the potential uses for photography has expanded. We live in a visual world. Most of us get most of our information as much from pictures as we do from words. Most Americans I believe get more of their information from current events and news from television than they do from newspapers.

In the future, with the paperless world that we're coming into over the next 94 years, the information highway, these pictures will be worth more, not less. The ability to package and transmit photography will increase and not decrease. CD ROM is already old hat.

It is over the next 94 years of potential use that Mr. Gasperini has been deprived of the value of this property to

himself and to his estate. That's what's lost here. Not the fact that he's made a thousand or $1500 a year so far.

The defendant wants you to punish him because he [446] chose not to exploit his own property which he was holding to write a book until after that event because they lost it. They want you to say: Well, limit your consideration only to those factors that have happened so far in time.

I'm sure if Mr. Gasperini knew that the defendant was going to lose his property he would have been sure to post it with a stock agency before leaving it with them in order to have a greater track record.

But that's not the point as you heard from Mrs. Kinne and as you heard from Mr. De Margitay this morning. It's over the lifetime of the copyright that these photos have potential value.

Ladies and gentlemen, I ask you to take that critically into consideration as that is what this case is about.

Now, the evidence has a whole is something you must also consider. You heard Mr. Goodman's testimony, you saw how Mr. Goodman came into this court and wouldn't even give me the back pages, photocopy the back pages of documents in his company's records that had the industry standard on [illegible]. You can infer from that why that wasn't disclosed.

MR. MONTBACH: Objection, your Honor.

THE COURT: Sustained.

MR. S. ABADY: Mr. Gasperini traveled as you [447] heard—

THE COURT: Without cutting you off, how much longer will you be?

MR. S. ABADY: About five minutes.

THE COURT: Please try to conclude if you can.

MR. S. ABADY: I am, your Honor. In Honduras, Guatemala, Costa Rica, Nicaragua, in El Salvador, in all of the hot spots of the Central American region he captured images, everything from the grisly face of war to the bucolic face of peace.

He was among the first people, he and Mr. Nachtway, to see poor Indian refugees repatriated back to their homes in the villages along the Atlantic coast.

At any time in the future, events could happen that could make those scenes invaluable. Pictures have all kinds of unanticipated value. Do you think the man that took the Rodney King video had any idea of its potential value or Abraham Zapruder when he took a picture of John Kennedy in a motorcade through Dallas.

Pictures can have all kinds of value, not simply as current events as Ms. Kinne explained to you, but as history of the recent past and distant past. Remember the example you heard from Mr. Zentmaier, a subpoenaed witness, that on D-Day all of a sudden 50-year old photos that have never sold before are selling like hot cakes.

[448] In conclusion, ladies and gentlemen, I ask you to think about Bill Gasperini, think about the nature and the quality of the evidence that you heard. Think about what it means to him and what it could mean to him if he still had, over the course of his lifetime and 50 years beyond, all of his life's work for seven years. And I believe if you look at the evidence in this case, the evidence that we presented, I believe that you will find the defendant at a minimum, at a minimum, must pay the industry standard which it used in dealing with all, many of its other customers or dealers, stock agencies and so forth.

In 1977, in 1977 generic pictures of a lunch room which was lost by the defendant caused the defendant to pay the company Photo Researcher—

MR. MONTBACH: No evidence of this.

THE COURT: No evidence as to what the pictures were that were lost, whether they were a lunch room or whatever.

MR. S. ABADY: I believe it's on the document in evidence.

THE COURT: The jurors' recollection will control.

MR. S. ABADY: The jurors will have the evidence.

THE COURT: They will indeed.

MR. S. ABADY: They paid them $750. Do you think **[449]** Mr. Gasperini's war photographs are worth the same as generic pictures of ordinary scenes that could be recreated. That's what the defendant paid in 1977. This is 1994.

I repeat Mr. Montbach. You use your common sense and ask yourself if the defendant paid $750 for Fifth Avenue street scenes, which is also in the exhibit, for photography that it lost in 1977, what should it be paying in 1994 for the kind of photographs that Mr. Gasperini took in Central America, the quality of which you see demonstrated in Exhibit 18.

So in the end, ladies and gentlemen, I conclude as I said before, if you look at the evidence as a whole, I believe you will find the evidence as a whole that we presented, who Mr. Gasperini is and the type of work that he generated, that at a minimum, he, like any other photojournalist, is entitled to a minimum of the industry standard.

I thank you for your patience.

THE COURT: Thank you, sir. As I explained earlier, members of the jury, Ms. Bravato will now project for you this Exhibit 10 which has to be done in open court because that's the only place we can present it, and you should watch it and give it consideration as evidence in the case the same as any other exhibit or testimony.

Everyone is going to sit here quietlyly while **[450]** that's done. No one is to say anything. As soon as she's finished playing all three of the cassettes, the clerk will excuse you for lunch and as soon as I get back from Foley Square, I think about 2:30, we'll resume and at that time I'll give you my instructions as to the law.

Please keep an open mind until you've heard the court's instructions as to the law. Thank you, very much. Thank you, counsel.

MR. S. ABADY: Thank you, judge.

(Tape played)

(Luncheon recess)

[451] AFTERNOON SESSION

3:16 p.m.

THE COURT: Good afternoon.

(Jury present)

THE CLERK: The court is about to instruct the jury. Any spectator desiring to leave must do so quietly.

CHARGE OF THE COURT

THE COURT: Good afternoon, members of the jury. I wish to begin by saying that I appreciate the fact that you've all given very careful attention to the evidence during this trial and I'm sure you'll approach your deliberations with that same fine spirit you've so far displayed and that you'll act with fairness and impartiality and reach a just verdict. In doing so you're not to be affected by sympathy for any of the parties or by any concern over what the reaction of the parties or the lawyers or anyone else will be, or whether it will please or displease anybody, or be popular or not. And you cannot give consideration to anything outside of the evidence which has been presented to you here in this courtroom and the applicable law.

As I told you when you were selected as jurors, in our court system the function of the trial judge and the function of the jury are different. Your purpose here is to decide and pass upon the disputed issues of fact and you're [452] the sole and exclusive judges of the facts. That's so important you may hear me say it more than once.

You should determine the facts from what you consider to be the believable or credible evidence in the trial. You'll also decide the weight and significance of the evidence, both the testimony and the exhibits, and you'll evaluate the truthfulness, credibility of the witnesses and you'll draw the common sense conclusions and reasonable inferences from the evidence that you think proper after discussing this case with each other.

And after you've resolved any conflicts as there may be in the evidence, you will have determined what the facts are and that will automatically lead you to your verdict, when you apply those facts to the law which I will be explaining to you at this time. And it's your obligation to accept the court's instructions as to the law and apply them to the facts as you find them to be. And on that basis you'll be able to render your verdict.

The evidence consists of the sworn testimony of all the witnesses, no matter which side called them, and all the exhibits. You may consider the documents and the exhibits which have been received in evidence and any fact which may have been stipulated to in the course of the trial may also be considered by you as proof. The exhibits will be in the jury room with you and you can look them over and [453] discuss them with each other in the course of your deliberations.

Questions are not evidence. Questions are never evidence. The evidence is the answers. Arguments of attorneys are not evidence and any evidence as to which an objection was sustained by the court, or any answer or argument by an attorney which was ordered to be stricken out by the court, must be disregarded by you in its entirety, and where evidence was received for a limited purpose, you'll use it only for that purpose.

Please understand that I have no opinion or thoughts as to how the factual dispute in this case should be resolved. That's your issue, that's yours alone and I leave it entirely to you. My only function here is to see that the trial is conducted as fairly and quickly as possible, and to explain the law to you on objections.

But the verdict is yours and it's yours alone and please don't get any notion from anything I may have done or said that I may have some attitude or viewpoint about the case. I do not, it is not my job, it's for you to decide. And don't think that I have any viewpoint whatever.

Now, as you understand, members of the jury, it's a civil trial which is devoted only to the issue of the amount of damages. In a civil trial, the plaintiff has the [454] burden to

establish all disputed elements of his or her claim by a preponderance of the credible evidence.

When a party has the burden of proof on a particular issue in a civil case, the contention of that party must be established by a fair preponderance of the credible evidence. That means the testimony you find worthy of belief.

Preponderance means the greater part of it. It doesn't mere the greater number of witnesses nor how much time either side employed during the trial. The phrase refers to the quality of the evidence, its weight or significance and the effect it will have on your minds.

You will decide disputed issues of fact from all the evidence that's before you. In order for a party to satisfy his burden of proof, the evidence that supports the claim on the issue must appeal to you as more likely or more nearly representing what took place.

On the other hand, if it does not or if the evidence is evenly balanced, then there's a failure of proof and you have to resolve the issue against the party that has the burden.

I know some of you may have been in criminal trials as jurors or you may have seen television shows or stage plays or anything like that that has to do with crime and you've heard the expression "proof beyond a reasonable **[455]** doubt." Members of the jury, that standard does not apply in a civil trial. That's the standard of proof which society requires before someone can lose his or her liberty and be convicted of a crime and that's a different standard than the standard applicable in a civil lawsuit such as in this case.

In this type of a case, a civil case, proof must appear to your satisfaction by a preponderance of the credible evidence. So please put out of your mind any discussion you may have heard about proof beyond a reasonable doubt, because that's for criminal trials only.

Now, in this case the defendant is a corporation. The mere fact that one of the parties is a corporation does not mean it is entitled to any lesser or greater consideration by you. All parties are equal before the law in this court, and corporations big or small are entitled to the same fair just consideration

that you would give any individual party and no more and no less.

You're instructed that a corporation acts through its agents or employees or officers working within the scope of their employment. And any fact admitted by a corporate agent or officer or director or employee concerning a fact matter within his or her work, scope of work or knowledge resulting from working for the corporation is an admission of fact on the part of the corporation and you can treat it **[456]** so.

You jurors, as I said earlier, are the sole judges of the truthfulness or credibility of any witness and you and you alone decide the weight the testimony of any witness deserves, and you should consider all the testimony before you that bears on this issue, and you should scrutinize the testimony given and decide whether it's worthy of belief.

You use your common sense as jurors in doing this. You may consider the witness' intelligence; the motive of the witness; the demeanor of the witness, that is to say the manner in which he or she gives testimony on the stand; you may consider the opportunity the witness had to observe the facts and remember them; you may consider the plausibility or probability or improbability of the testimony in light of all the other facts in the you can also consider any relationship which the witness may have to either side in the case; or the manner in which a witness may be affected by or interested in the outcome of the trial; or any bias or favor that any witness may have toward either side in the trial.

There's no magic formula to do this. In your everyday lives each of you determines the reliability of statements made to you by other people. The same tests you use in your everyday dealings and your common sense are to **[457]** be relied upon in your jury deliberations.

Now, there have been occasions in the trial when witnesses, having some specialized training or experience in a particular field, have been permitted to give testimony in which they express opinions or conclusions as to practices or matters or knowledge or information in the field in which they have a specialized training or experience.

This type of testimony, so-called opinion evidence, should be given such weight as you think it deserves. If you decide that the opinion of a specialized witness is not based on sufficient experience or knowledge, or if you conclude that the reasons given in support of the opinion are not sound, or if you feel that the opinion is outweighed by other evidence, or simply if you think it's wrong, you may disregard that testimony entirely.

You, because you're the sole judges of the facts, have the right to accept or reject any part of any opinion evidence from persons having any specialized training or knowledge or experience as you think proper, just as you do with respect to any other testimony in the trial.

Now, in this case, as I said earlier, you'll decide only the question of damages. That is to say, you will determine what single amount of money in dollars, lump sum in dollars, will fairly and justly compensate the plaintiff for the loss of his property. The question of **[458]** liability is not at issue. 310 slides have been lost. All evidence concerning the slides will be received and considered by you only on the question of damages.

As you understand, the plaintiff in this case is Mr. William Gasperini, the defendant in this case is the Center for Humanities Inc. doing business as Guidance Associates, and there's no dispute that 310 slides have been lost.

Now, the plaintiff has the burden of proving the amount of his damages within reasonable certainty by a preponderance of the credible evidence.

The purpose of damages is to award as far as possible just and fair compensation for the loss. You must award the plaintiff sufficient damages in your judgment, after deliberation and based on your consideration of all the evidence in the trial, which will compensate him for his loss. This is what's called compensatory damages. Compensatory damages seek to compensate or make the plaintiff whole, that is to compensate him for his loss to the extent that money can do so.

Damages are not being awarded to punish anybody but only for fair compensation.

Computing damages may be difficult but you must not let that difficulty lead you to engage in arbitrary decision-making or guesswork. On the other hand, the law **[459]** does not require a plaintiff to prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You can use your own common sense and you're not bound to accept or reject any particular contention or any particular testimony, but you look at the entire picture and everything developed at the trial. You're to use your sound discretion in fixing an award of damages, drawing reasonable inferences, where you deem appropriate, from the facts and the circumstances in evidence.

Damages must not be based on speculation or sympathy, but on the evidence and only on the evidence.

Now, in making this determination, you may take into consideration the fair market value of the property lost at the time and place of the loss—that's the basic measure of damages in this case—and you determine that by understanding that the fair market value is that price at which a fully informed and willing owner, under no compulsion to sell, would have voluntarily sold; and a fully informed buyer, under no compulsion to buy, would have voluntarily bought and paid for all the rights of the owner in the 310 slides which were lost.

Now, in reaching this issue of value, you'll use your common sense, and, as I said earlier, you'll rely on all facts known to you in the case and all the testimony **[460]** bearing on value. You will consider the ability and experience and knowledge of the photographer; the reputation of the photographer or photojournalist, or whatever it is that you wish to refer to him as; you'll consider the prior licensing fees collected and the prior experience of the plaintiff in connection with his slides; you may consider the extent and nature of his efforts to exploit the economic value of these transparancies; you can consider the content and subject matter of the lost slides; you may consider potential competition or alternative sources of similar or substitute photography; you can consider the nature of the demand in the market for the use of pictures of this particular type and content.

If you find that it would take a long period of time to sell or otherwise dispose of the transparancies between a willing seller and a willing buyer, you may discount for a reasonable length of time you think it might take. You may also reduce the value for any considerations which you may think proper involving the cost of merchandising, either by stock agency or by any other ordinary business means.

You may consider the potential use of the slides for the purposes of writing a book, if you find, based on the evidence, that the plaintiff actually did intend to write a book or books and would have used the pictures for [461] such a book and that it would be economically profitable to do so.

You're considering the entire bundle of rights involved in the photographs, not merely a single use licensing fee, and therefore you should fix the value of the slides or transparancies over the life of the copyright. And you must understand also that you'll determine this fairly and reasonably from all the evidence in the case, and an amount claimed in the complaint has no evidentiary value whatsoever, and the argument of the attorneys as to value are only useful to you to the extent that you, after deliberating the case, agree with them. If you think there's been exaggeration or undue minimization of the value by any witness you can take that into consideration also.

Now, you have heard some discussion or argument on this issue of whether there is an industry standard. You may consider the existence of industry practices for whatever value it has or whatever assistance it gives you in dealing with this issue of the lost slides. However, any such evidence is only evidence and it's not conclusive and not binding.

And you're instructed that there is no evidence in this trial that there was any memorandum receipt incorporating the specific amount as set forth in 13D, Exhibit 13, any of the subexhibits of 13 which have been [462] received in evidence, and there's no evidence that these parties agreed on the industry standard or that these parties used it or indeed that the standard is always enforced in the everyday business world.

But as I said earlier, the evidence which you've heard in some detail about the existence of this standard or the practice may be considered by you for such evidentiary value as you think it has, together with all the other evidence in the case, in bearing upon the value of the ownership, total ownership of the missing or lost slides.

Now, you will reach your verdict by deliberation. And jury deliberation requires fair and impartial consideration by each juror. Each juror is entitled to his or her own opinion. And you're required to exchange your opinions or views with one another. That's jury deliberation. You give your own opinion and listen to the opinions and judgment of the other jurors just as you would discuss an important matter in polite conversation.

And in that way, if you keep at it, you should be able to come to an agreement with one another. Talk about the case openly and reason it out and discuss the evidence fairly and politely and take your time and say your own views and listen with an open mind to what the others have to say.

But the verdict can only be reached by [463] deliberation and it represents the decision of all jurors and there's no shortcut to reach a verdict in a case of this sort. There's no way of getting unanimity by splitting the differences or anything like that. You just talk about it until you agree together on a single figure of damages and dollars. And you're not to give up your own view simply because you're outnumbered or outweighed or outtalked by the other jurors.

But by the same token you shouldn't be obstinate. If you find that the other jurors' logic or argument appeals to you as being more correct than your own, in other words, if they really convince you, then you should not hesitate to change your mind and agree with the others if you do in fact agree.

As I said earlier, the verdict represents the decision of each of you and it must be unanimous and you have to exercise your conscientious efforts to agree together and reach an unanimous decision without giving up your own conscientious views.

You will have the exhibits in the jury room and if there is anything that I've said in my legal instructions that's unclear to you or you don't remember it or you don't understand something that I've said, you may want me to explain it better or repeat it and you can send out a note with such a request.

[464] If you really want to have testimony read back to you, we'll try to do that also. If you do, you'll be brought out in open court and the court reporter will read to you and that's a lengthy process. So please send out as clear a note as possible telling what you want to hear and please don't request a reading of testimony until you've had a chance to talk with one another because obviously the memory of all six people is better than the memory of any one juror. And if you talk about it together and discuss it, it may refresh your recollection and you may not need to have anything read to you.

But as I said, I'm perfectly willing to do it if the jurors think it's necessary and all you have to do is send out a note telling me what you want.

The jury instructions which I have been going through at this time have been taped on a tape recorder. The tape recorder and the machine to play it will be furnished to you in the jury room for your use if you wish to listen to the court's instructions again in whole or in part.

The fact that it's being given to you doesn't mean you have to use it. It is your decision and yours alone whether playing all or part of the tape recording will be helpful to you. If the tape is unclear or garbled for any reason, we do have the court reporter here who can read **[465]** back the court's instructions if need be or I will attempt to repeat it from my notes in whole or in part.

Now, when you'll knock on the door and tell the clerk that the jury has reached a verdict. Then you'll be brought out into open court and seated in the jury box and the foreperson of the jury, which is juror number 1 on my right, will be asked whether the jury has reached a verdict. And if the foreperson answers yes the jury has reached a verdict, the clerk will then ask you to state your verdict and that will be stated by saying:

We find for the plaintiff in the total amount of X dollars, stating the dollar amount upon which the jury has agreed. And after the foreperson has stated the verdict, each of the rest of you will be asked, one-by-one, whether the verdict as reported is your verdict, in order to assure that it's unanimous.

Now, it may be that there's something additional which the attorneys will want me to say to you so I'm going to ask you to stay right where you are and don't talk with each other and continue to keep an open mind so I can speak with the attorneys and see if there's some additional point which perhaps I should have raised with you or should add to my instructions. So please just stay right where you are.

(At the side bar)

THE COURT: Recognizing that you're entitled to **[466]** preserve exceptions for anything that you had raised with me in the charge conference which was not covered in substance, or anything that you requested in writing which I did not do, is there anything further or additional?

MR. S. ABADY: Your Honor, we would request for the record that plaintiff's proposed instruction number 8 as to similar acts directed to defendant's knowledge as having previously taken delivery—

THE COURT: Declined and you have an exception.

MR. S. ABADY: Plaintiff's request 17 with respect to impeachment by prior inconsistent statement.

THE COURT: Declined and you have your exception. In this trial there really were no prior inconsistent statements that are relevant to any issue of damages.

MR. S. ABADY: There were times in which the first witness, several times when she was impeached by prior inconsistent statements.

THE COURT: Not impeached. I decline to say anything further on credibility than in the ordinary boilerplate.

MR. S. ABADY: I mean no criticism of your Honor here.

THE COURT: I understand.

MR. S. ABADY: I requested, your Honor, that you give an instruction as to intrinsic value.

[467] THE COURT: Declined. I ruled on that earlier. This is a dealing between business people engaged in photojournalism.

MR. S. ABADY: I have nothing further, Judge.

MR. MONTBACH: I have nothing, your Honor.

THE COURT: Thank you.

MR. S. ABADY: I'm sorry, Judge.

MR. J. ABADY: I was going to make a request that you instruct that copyright as to the lifetime of the photographer—

THE COURT: That's already been told them. They know his age. I decline to elaborate further on that.

(In open court)

THE COURT: Members of the jury I have nothing more to add at this time except to say one thing: It is entirely a matter for your own scheduling. There's no requirement that you stay late. You will not be sequestered. If you wish to break for the day, just send out a letter saying, send out a little note saying that the jury has agreed to recess for the day and you'll come back tomorrow morning, probably at 9:30 or whatever hour within reason that you want to choose and resume your deliberations in the morning. So don't feel pressed for time or crowded in any way. You can stay as late as you reasonably want to and you can go home when you're ready to go home.

[468] Please go in the jury room and begin your deliberations.

(Deliberations begin; 3:44 p.m.)

THE COURT: The record should show that the attorneys have agreed to all exhibits.

MR. MONTBACH: Yes.

MR. S. ABADY: That's right, your Honor.

THE COURT: And you're seeing now what the clerk is taking in and also a view box is being taken in. Thank you, very much.

(4:09; jury not present)

THE COURT: The court has received the note from the jury and the note has been exhibited to counsel. It says "We're wondering why a delivery memo was never signed between Mr. Gasperini and Mr. Goodman."

The court will now hear counsel. My proposal is to tell them that that's not a question which the court can answer and that's not a question which is a matter of their concern. They have to take the facts as they find them and their function is to fix the market value of the lost slides.

MR. S. ABADY: Your Honor, I would propose that you remind the jury that there were two points of testimony on precisely that issue. Mr. Gasperini himself testified that he delivered personally the slides and worked with them [469] at the premises and then was called away to the Persian Gulf. Susan Green confirmed that. And Jane Kinne testified that there would be no purpose for him to have a delivery memo in light of the fact that it would be in her words like writing—

THE COURT: Who were these witnesses?

MR. S. ABADY: The plaintiff so testified, Susan Green, who was called by the plaintiff, the defendant's former employee gave verisimilitude to the plaintiff's testimony and Jane Kinne testified when I propounded the question to her that it made sense that Mr. Gasperini would not have a delivery memo as it would be like writing a memo to yourself since he wasn't sending them by courier or Federal Express to the defendant but he carried them with him, carried the slides with him to the defendant's premises and had no intention of leaving them there except that he was called away to the Persian Gulf.

MR. MONTBACH: I don't agree with that characterization; You've already made a charge to the jury that there is no delivery memo involved in this transaction and I think there's no need to embellish upon that.

MR. S. ABADY: But there's testimony in the record that the jury can hear.

THE COURT: I'll try to cover it. After I cover it, if you want to be heard at the side bar you can ask for [470] something further. Please bring in the jurors.

(Jury present)

THE COURT: Members of the jury, I have your note. It says "We're wondering why a delivery memo was never signed between Mr. Gasperini and Mr. Goodman."

That is really a question which asks for an issue of fact, a fact question rather than a law question. Fact questions are solely for the jury from the evidence. The court answers only questions of law, questions of procedure.

I would like to say to you that there was some testimony from at least three of the witnesses bearing on this topic, the bottom line, however, is that—and if you wanted any of that testimony read back, both the-plaintiff and the witness Green and the witness Kinne mentioned this in passing in their testimony, and if you'll talk to each other you'll probably remember what they said—but the bottom line was there was no delivery memo signed.

And you have to take the facts of the case as you find them to be, and it's for you to find the market value of the missing slides in dollars based on all the testimony in the case, determining why may not directly bear on the issue of market value. Because the fact is there is no delivery memo signed as you seem to recognize in your note.

I hope I've answered your question directly and I'm going to ask you to stay where you are for a moment [471] while I see if the attorneys have any additional request as to how I should answer it.

(At the side bar)

MR. S. ABADY: That was fine, Judge.

MR. MONTBACH: Your Honor, they're trying to create a contract where there is no contract. I think it has to be pointed out to the jury that there is no contract.

THE COURT: I decline to do so beyond what I've already done. I have told them there is none. They know there is none.

(In open court)

THE COURT: Please resume your deliberations.

(Deliberations resume; 4:15 p.m.)

(Jury present; 4:39 p.m.)

THE CLERK: Will the foreperson please stand and respond as I inquire. Has the jury agreed upon a verdict?

THE FOREPERSON: Yes, we have.

THE CLERK: How do you find?

THE FOREPERSON: We award the plaintiff 450,000, which is 1500 each, for 300 slides.

THE COURT: You may be seated.

THE CLERK: Members of the jury, listen to your verdict as it stands recorded. You say you find a verdict in favor of the plaintiff awarding him $450,000. Is that your verdict?

[472] (Jury polled; all answered affirmatively)

THE COURT: Thank you, very much. The court will order that the jury's verdict be recorded and that the clerk of the court shall enter judgment thereon together with prejudgment interest of 9 percent per annum from August 30, 1991, and at this point I want to thank the jurors for their service here in the court during June and we appreciate very much your efforts and the conscientious attendance.

You're now excused with the thanks of the court. You're free to discuss the case if you want to. You're certainly under

no obligation to discuss it with anybody, including myself. I don't plan to ask.

You'll feel better, if anybody should ask you about the case, tell them go away, don't bother me because it's past and you've done your obligations and there's no need to look back and not any need to discuss it with anybody unless you're absolutely sure you want to do so.

Please have a pleasant weekend and holiday and you're excused with the thanks of the court. You may withdraw from the courtroom at this time.

(Jury excused)

THE COURT: Both sides will keep their own exhibits and you may pick them up from the clerk as soon as she has gathered them together. Thank you all for your efforts. The court will be in recess.

[473] MR. S. ABADY: Will the judgment be issued this afternoon or tomorrow?

THE COURT: It will issue today but there's a regular ten day stay in the statute.

MR. S. ABADY: That I'm aware of.

THE COURT: And I'm sure that it's a case which will merit the attention of the Court of Appeals for the Second Circuit.

MR. MONTBACH: Yes, your Honor.

THE COURT: The court will be in recess.

MR. S. ABADY: Thank you again, Judge.

(Record closed)

[474] WITNESS INDEX

Name	*Direct*	*Cross*	*Redirect*	*Recross*
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WILLIAM GASPERINI	210	271	309	
WILLIAM KUEBLER	311	316	318	
JANE KINNE	319	353		
GIDEON DE MARGITAY	374	393	409	411

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 CIVIL 7204(CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC,
d/b/a GUIDANCE ASSOCIATES

Defendant.

The issues in the above entitled action having been brought on for trial before the Honorable Charles L. Brieant, United States District Judge with a jury on June 6, 1994, and at the conclusion of the trial, the jury having returned a verdict in favor of the plaintiff in the amount of $450,000.00 and the court thereafter directed the clerk to enter judgment in favor of the plaintiff with pre-judgment interest at the rate of 9% per annum from August 30, 1991, it is,

ORDERED, ADJUDGED and DECREED: That the plaintiff William Gasperini have judgment in the sum of $564,750.00, as against the defendant.

DATED: White Plains, N.Y.
June 30, 1994

APPROVED:

/s/ CHARLES BRIEANT
U.S.D.J.

/s/ JAMES M. PARKINSON
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7204(CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Francis A. Montbach, sworn to the 11th day of July, 1994, the exhibits annexed thereto and the accompanying Memorandum of Law, defendant, The Center for Humanities, Inc. d/b/a Guidance Associates, will move this Court, at the Courthouse, 101 East Post Road, White Plains, New York, Courtroom No. 31 for an Order pursuant to Rule 59 of the Federal Rules of Civil Procedure granting defendant a new trial, on the issue of damages, in the captioned matter, said motion to be heard on the 29th day of July, 1994 at 9:00 a.m. in the forenoon of that day.

In accordance with FRCP Rule 59(c), opposing affidavits, if any, must be served upon movant within ten (10) days of service hereof.

Dated: New York, New York.
July 11, 1994.

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant
The Center for Humanities d/b/a
Guidance Associates

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7204(CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

AFFIDAVIT

FRANCIS A. MONTBACH, being sworn, deposes and says:

1. He is an attorney duly admitted to practice before this Court and is a member of the law firm of BIGHAM ENGLAR JONES & HOUSTON, attorneys for the defendant The Center for Humanities, Inc., d/b/a Guidance Associates herein. Having handled this matter since its inception, deponent is fully familiar with all the facts and circumstances had herein.

2. Deponent submits this affidavit in support of defendant's motion to set aside the verdict of the jury rendered herein on June 30, 1994 and the judgment entered thereon on June 30, 1994 and to grant a new trial on the following grounds:

a. The verdict is contrary to the law.

b. The verdict is contrary to the evidence.

c. The evidence in this case is totally insufficient to show damages, as awarded, in the amount of $450,000.00, and there is no evidence to sustain the verdict of the jury herein.

d. The evidence, construed in its most favorable light on behalf of the plaintiff, was insufficient to support the verdict of $450,000.00 rendered for the plaintiff against the defendant herein.

e. The verdict of the jury herein is excessive and appears to have been given under the influence of passion and prejudice.

f. The Court erred in denying defendant's Motion *In Limine* and erred in permitting plaintiff, on direct examination of the plaintiff's witnesses and cross-examination of defendant's witnesses, to introduce testimonial and documentary evidence concerning the existence and amount of an industry standard" in the amount of $1,500.00 pursuant to which lost and/or damaged slides should be valued.

g. The Court erred by refusing to allow defense counsel to cross-examine plaintiff concerning the uniqueness of the photographs taken by plaintiff in Central America, which were the subject of plaintiff's claim.

h. The Court erred in refusing to give defendant's Requested Special Jury Instruction No. 1.

i. The Court erred in denying defendant's oral motion to quash those portions of plaintiff's trial Subpeonae Duces Tecum which compelled production of "delivery memos" and/or "delivery receipts" received by defendant from photo stock agencies and which contained language concerning the "industry standard" for valuation of lost and/or damaged slide transparencies. The subpoenaed documents were irrelevant and should not have been admitted into evidence.

3. On June 30, 1994, at the conclusion of approximately two full days of trial the jury awarded plaintiff damages in the amount of $450,000.00. In rendering its verdict, the jury specifically stated that it arrived at its award by multiplying three hundred lost slides by one thousand five hundred dollars per slide. At the outset of this trial, defendant brought on a Motion *In Limine*, seeking to preclude the introduction of any evidence concerning the existence of a claimed minimum industry standard of $1,500.00 per slide for valuing lost or damaged slide transparencies. In addition, at the outset, defendant brought on an oral motion to quash those portions of the trial subpoenae served on employees of defendant which called for the production of delivery memos or receipts received by defendant from photo stock agencies which were not involved in this action. Both of these motions were denied by the Court (See Exhibit "A" annexed hereto with regard to denial of the Motion in Limine) and, with regard to the Motion *In Limine*, the Court expressed the opinion, as it did at other times during the trial, that common sense dictated that no juror would believe that each and every missing slide had a value of $1,500.00

4. The denial of the Motion *In Limine*, over the objection of counsel, permitted plaintiff to repeatedly introduce highly prejudicial testamentary and demonstrative evidence of not only the existence of an "industry standard" of $1,500.00 per lost or damaged slide, but of defendant's "knowledge" of that standard and acquiescence in it (allegedly by failure to refuse to accept photographs from stock agencies which delivered photos accompanied by delivery memos containing language referencing the $1,500.00 "industry standard"). Plaintiff introduced testimony, over defendant's objection, With regard to the $1,500.00 "industry standard" during plaintiff's direct examination of defendant's President, Mr. William Goodman, and during plaintiff's direct examination of the three "expert" witnesses who gave testimony on plaintiff's behalf, Robert Zentmaier, William Kuebler and Ms. Jane Kinne.[1] In addition,

[1] It should be noted that both Mr. Zentmaier and Mr. Kuebler were presented as fact/expert witnesses and allowed to testify over the objection of defendant, despite the fact that Mr. Kuebler was originally listed only as a fact witness and was changed, on the morning of June 27, 1994, to an expert witness, while Mr. Zentmaier who was never listed as a fact or expert witness, was not named as a witness, fact or expert, until immediately prior to opening statements. Defendant neither received a written report of their proposed testimony nor were permitted to depose them prior to trial.

plaintiff introduced and the Court admitted as evidence, over defendant's objection, numerous documents which contained verbiage referencing the claimed "industry standard". Specifically, the Court referred to plaintiff's Exhibits 12A, E, F, G; 13 A through H and 30, stock agency delivery memos, all of which were introduced to emphasize the claimed existence of an "industry standard" of $1,500.00 per lost or damaged slide and defendant's "awareness" of that "standard".

5. With regard to plaintiff's Exhibit 30, defendant's copies of delivery memos from stock agencies, plaintiff's counsel repeatedly highlighted the inadvertent failure to provide copies of the reverse side of the documents and implied, to the jury, that defendant was trying to "hide" its knowledge of the "industry standard". Such was not the case, however, it is evident from the jury verdict, and the manner in which the jury calculated damages that they not only believed the repeated assertion that a $1,500.00 "industry standard" for valuing lost slides existed, but believed that defendant's acceptance of delivery memos from stock agencies which contained the "industry standard" valuation language somehow bound defendant to pay that amount to plaintiff, even though there was no delivery memo covering the missing 300 slides or mention of the "industry standard" during any discussions between Mr. Gasperini and defendant. The admission of the delivery memos was highly prejudicial. Although they were purportedly admitted only for a limited purpose, their prejudicial effect greatly outweighed any probative value since there was no delivery memo between plaintiff and defendant in this case.

6. Had defendant's Motion *In Limine* been granted, the jury would not have been prejudiced by the continual repetition of

the $1,500.00 "industry standard" mantra and would have been able to render an award based upon the recognized criteria set forth in defendant's Requested Special Jury Instruction No. 1 (a copy of which is annexed hereto as Exhibit "B"), which criteria were discussed in defendant's Trial Memorandum of Law.

There was no evidence submitted by plaintiff that any of the lost photographs were unique. In fact, the Court, in precluding deponent from questioning plaintiff on the topic of the existence of other photographers at the times the lost photos were taken, stated that it was common knowledge that there were many other photographers present in Central America at the time that plaintiff was taking his photographs. Exhibits submitted to the jury clearly established that Mr. Gasperini's photographs, while being of good quality and of interesting subjects, were not unique. In addition, defendant's expert, Mr. Gedeon de Margitay, specifically stated that over 80% of the missing 300 slides had, at best, minimal market value, due, in part, to the fact that similar pictures were readily available from other sources, such as The Associated Press. The jury having had the $1,500 "industry standard" drummed into their heads, was severely prejudiced by evidence which should have been excluded.

8. Likewise, the prejudicial effect of the "industry standard" testimony allowed the jury to totally disregard the primary criteria for establishing the value of lost slides, especially the earning power of the photographer. The only nonspeculative evidence before the jury concerning Mr. Gasperini's earning power demonstrated that he had earned less than an average of $1,000.00 per year over the last decade from the use from the of the photographs which he took while in Central America, yet the jury awarded him almost 50 times his total prior demonstrated earnings as a result of the loss of six percent of the photographs he took. While Mr. Gasperini contended that the lost 300 slides were his best, he did not demonstrate that those slides had any significant earning power or potential, or for that matter that he had any proven earning power as a photographer.

9. Similarly missing was any evidence that the so-called "industry standard" of paying $1,500.00 per slide for lost or damaged slides was ever followed by the industry. None of the experts presented by the plaintiff ever testified to that effect. In fact, plaintiff's prime experts, Ms. Jane Kinne and Mr. Robert Zentmaier confirmed the fact that in the one instance where defendant had lost slides belonging to Photo Researchers, Inc., a payment of less than 50% of the so-called "industry standard" was made, despite the fact that the "standard" was specifically set forth on the delivery memo pursuant to which the lost slides had been given to defendant. The non-existence of a custom and practice in the industry to pay $1,500.00 per lost or damaged slide was confirmed by Mr. de Margitay. Plaintiff did not submit one scintilla of evidence that of any member of the "industry", including defendant, ever having paid $1,500.00 per slide for a lost or damaged slide, despite the fact that both Mr. Zentmaier and Ms. Kinne had worked for stock agencies virtually all of their lives. Contrary to the evidence that no industry standard exists, factually or legally[2], the jury, undoubtedly swayed by the constant reference to a $1,500.00 "industry standard", nevertheless applied the nonexistent "industry standard" to plaintiff's loss. They did not find that the misplaced slides had a "value" of $450,000.00, rather, as they stated, they reached the $450,000.00 damage figure by multiplying the 300 misplaced slides by the $1,500.00 "industry standard".

10. Had defendant's Motion *In Limine* been granted, the jury would not have been constantly exposed to a claimed "standard" which was never factually or legally established by the plaintiff. It would have had to make its award based upon testimony addressed to the true issue which should have been decided; the amount of damages recoverable applying the criteria established by the courts, to wit: (1) the uniqueness of the subject matter; (2) the established prestige and earning level of the photographer; (3) the frequency of accep-

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[2] The Court is referred to the decisional law cited in defendant's Trial Memorandum of Law and Memorandum of Law in Support of the denied *Motion in Limine*.

tance by users; and (4) established sales and use prices. The testimony at trial which should have been, and obviously wasn't, considered by the jury clearly established that the photographs were not unique and were not in demand; Mr. Gasperini had a very low earning level as a photographer and was not a known photojournalist—other than to his friends; and that the most Mr. Gasperini was ever paid for the use of his work was approximately $100.00, something which occurred only on rare occasions. Application of the accepted criteria, in the absence of any consideration of the non-existent "industry standard" should and would undoubted have resulted in an award of less than 10% of the $450,000.00 awarded. An award in the value range testified to by defendant's expert, between $15,000 and $20,000 would have amounted to approximately twice Mr. Gasperini's total earnings from his photographs during his lifetime. It must be conceded that the award of $450,000.00 has no evidentiary basis, is extremely excessive and can only have resulted from improper prejudice brought on by the improper admission of evidence of the existence and applicability of the non-existent "industry standard" for $1,500 per slide.

11. In light of the foregoing, it is wholly proper for this Court to exercise its considerable discretion and order a new trial of this action, in view of the fact that the jury's verdict was inconsistent with the weight of the credible evidence and resulted from the prejudicial effect of admission of testimony regarding a non-existent "industry standard", over the objection of defendant. To do otherwise would be a miscarriage of justice.

12. This motion is based upon the papers and proceedings in this action.

WHEREFORE, it is respectfully requested that an Order be entered, pursuant to Rule 59 of the Federal Rules of Civil Procedure, granting a new trial on the issue of damages in this action and for such other and further relief as to this Court shall seem just and proper.

/s/ FRANCIS A. MONTBACH
FRANCIS A. MONTBACH

Sworn to before me this
11th day of July, 1994.

/s/ SAMUEL O. OTCHERE
Notary Public

SAMUEL O. OTCHERE
Notary Public, State of New York
No. 01OT5012161
Qualified In Queens County
Certificate Filed in New York County
Commission Expires June 15, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7204(CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

MOTION IN LIMINE

Defendant, The Center for Humanities, Inc., d/b/a Guidance Associates, by its attorneys, BIGHAM ENGLAR JONES & HOUSTON, hereby moves this court, at the Courthouse, White Plains, New York on June 27, 1994 *in limine*, for an Order precluding the plaintiff in the within action, William Gasperini, from presenting any evidence during the trial of this action with regard to the existence and/or applicability of a claimed "industry standard" pursuant to which a uniform predetermined minimum amount of compensation is assigned to each and every slide transparency which may have been lost or damaged. This Order is requested in light of the prevailing decisional law establishing that no such "industry standard"

Motion Denied. See Transcript of Trial for oral decision

SO ORDERED

June 27, 1994

CHARLES L. BRIEANT
USDJ

DEFENDANT'S REQUESTED SPECIAL JURY INSTRUCTION NO. 1

DAMAGES

If you should find, from a preponderance of the evidence in this case, that the plaintiff is entitled to a verdict, the law provides that the plaintiff is to be fairly compensated for his damages, if any, which were proximately caused by the defendant's conduct. Your verdict must be to compensate the plaintiff, and not to punish the defendant. Any award of damages to the plaintiff must be based upon a reasonable certainty and not speculation.

In making this determination you are not to take into consideration any claim that there exists an industry standard pursuant to which a photographer is entitled to a set amount of money per slide for slides which are lost or damaged[1]. Rather, you are to determine the amount of compensation the plaintiff should receive in order to place him in the same position he would have been prior to the loss by taking into consideration the following criteria:[2]

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[1] *Gentien v. The Hearst Corp.*, NYLJ, March 5, 1993, Page 25, Col. 2 (App. Term, 1st Dept.).

[2] *Miller v. Newsweek*, 675 F. Supp. 872, 876 (D.Del. 1987); *Ratner v. GEO Magazine*, NYLJ, March 16, 1986, Page 39, Col. 2 (S.D.N.Y.)

1. *THE ESTABLISHED PRESTIGE AND EARNING LEVEL OF THE PLAINTIFF AS A PHOTOGRAPHER.*

   If you find that the plaintiff was not an established and/or known photographer or that he did not have a record of earnings from his photography, you should take this into consideration in your award.

2. *THE UNIQUENESS OF THE SUBJECT MATTER.*

   If you find that the subject matter of some or all of the lost slides were of unique subjects which are not available elsewhere, then this should be reflected in the amount of compensation you award. Should you determine that the subjects represented in the lost photographs were not unique and/or that other photographs of the same or similar subjects are available, then your award should reflect this fact.

3. *FREQUENCY OF ACCEPTANCE BY USERS.*

   You should take into consideration whether or not the plaintiff has proven that his photographic work is used with any frequency by users of photography. If his work is not in demand or if photographs of the subject contained in the lost slides are not in demand, then this factor should be part of your consideration.

4. *ESTABLISHED SALES AND USE PRICES.*

   You should take into consideration the amount of compensation the plaintiff has received in the past from the sale or use of his slides in determining any compensation he may be entitled to.

Once you have taken all of these criteria into consideration, with an emphasis on the first two, you should determine the

amount of money, if any, which should be awarded to the plaintiff to make him whole.

AUTHORITIES:

Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions, Civil*, Vol. 3, Section 86.07.

Given ___ Refused ___ Modified ___

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 7204 [CLB]

WILLIAM GASPERINI,

Plaintiff,

- —v.—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

DECLARATION IN OPPOSITION TO DEFENDANT'S RULE 59 MOTION FOR A NEW TRIAL

Samuel A. Abady, a member in good standing of the bar of this Court, and Jonathan S. Abady, admitted to this Court *pro hac vice*, pursuant to 28 U.S.C. §1746, affirm as follows:

1. We are counsel to plaintiff William Gasperini in this property damage action involving the loss of 310 slide transparencies. We submit this affirmation in opposition to the motion by defendant for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. As set forth below, and as demonstrated in the accompanying memorandum of law, defendant's motion is baseless in all respects, and should be denied.

PRELIMINARY STATEMENT

2. Each argument in defendant's Rule 59 motion is nothing more than a rehash of arguments raised both before and during trial. The Court previously ruled upon and denied each and every argument in defendant's Rule 59 motion. Hence, defendant has improperly sought to reargue issues previously determined under the guise of a motion for a new trial.

3. The Court's rulings appear throughout the trial transcript, and are referenced below.[1]

GROUNDS FOR DEFENDANT'S RULE 59 MOTION

4. Defendant's motion is purportedly based on nine different grounds. However, upon examination, it is clear defendant has advanced but five arguments: (i) the verdict is contrary to law; (ii) the verdict is contrary to the evidence; (iii) the verdict was the result of passion and prejudice; (iv) the Court improperly limited defense counsel's cross-examination of Mr. Gasperini regarding the presence of other photographers when Mr. Gasperini was taking certain photographs in Central America; and (v) the Court improperly denied the motion in limine to prohibit plaintiff's expert from testifying about the minimum industry standard for valuation

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[1] Upon receipt of defendant's Rule 59 motion, counsel herein immediately contacted the Southern District Reporters to obtain the trial transcript on a "rush" basis. Stenographers from two branches of that office recorded the trial, *viz.*, those from the White Plains branch on June 6, 1994 (jury selection) and June 27, 1994 (the first trial day); and Aldi Goren of the Manhattan branch on June 29 and 30, 1994 (the second and third trial days.) Pages 150 through 475 were made available (excluding the jury charge at pp 451 to 467.) However, Ms. Gorayeb of the White Plains office advised that the first trial day could not be produced until two to three weeks after the return date of this motion.

Accordingly, defendant's counsel agreed to stipulate to extend plaintiff's time to reply in order for both sides and the Court to have the full trial transcript available. A stipulation was prepared and delivered by hand, at defense counsel's request. Two business days before plaintiff's answering papers were due, however, defendant's counsel suddenly refused to sign the stipulation. Hence, references to events at trial prior to June 29, 1994, are from memory.

of original slide transparencies, or in the alternative, improperly permitted plaintiff to introduce evidence about the industry standard.[2]

5. Each of these five points is addressed separately below.

THE VERDICT WAS NOT CONTRARY TO LAW

A. The Causes of Action Were Proven Under New York Law

6. Plaintiff submitted an extensive pre-trial brief demonstrating that each cause of action set forth in the complaint was sound, and that defendant's affirmative defenses were wanting. Defendant's contention to the contrary is meritless. Plaintiff will not burden the record with recapitulation of the pre-trial brief, but respectfully refers the Court to the arguments set forth therein.

7. Defendant conceded that: (i) it received 310 of Mr. Gasperini's slides for reproduction in the video series it produced, "Conflict in Central America," and paid Mr. Gasperini royalties for use of his slides;[3] (ii) the slides were not purchased, but remained Mr. Gasperini's property; (iii) it failed to return the slides to him, and in fact, lost the slides.[4]

8. The pre-trial brief amply demonstrated that, as a matter of New York law, these facts conclusively prove the causes of action stated, *viz.*: (i) mutual bailment for value; (ii) negligence; (iii) breach of contract; and (iv) conversion.

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[2] Defendant's grounds set forth in items (b), (c) and (d) of Mr. Montbach's affidavit at page 2 are restatements of the same argument, i.e. that the verdict was not supported by the evidence; items (f), (h) and (i) at page 3 are restatements of the same argument, i.e. that evidence about the industry standard should have been excluded. Hence there are but five points at issue.

[3] *See*, e.g., Tr. at 193-97.

[4] Q. We're talking about 310 slides, isn't that correct, sir?
A. I believe so, yes. [Tr. at 198.]

B. Determination of Damages Was An Issue of Fact, Not Law

9. Defendant argues that, according to certain decisions of other courts, there is no minimum industry standard as a matter of New York law, and falsely claims there was no evidence to support the jury's damage award. This argument is flawed for three reasons.

10. First, the issue is one of fact; the cases defendant cites are simply those in which a plaintiff failed to adduce evidence proving the existence of the industry standard in that Mr. Gasperini was not a party to those actions and is not collaterally estopped by the failure of an unrelated plaintiff to meet his or her burden of persuasion.

11. Second, case law makes clear that the New York courts recognize and enforce the minimum industry standard. Contrary to the misleading arguments in defendant's brief, New York courts have repeatedly upheld awards of $1,500 per slide.[5]

12. Third, there was ample evidence to support the award, specifically regarding (i) the quality and technical excellence of Mr. Gasperini's photographs; (ii) the extraordinary conditions under which the photographs were obtained; (iii) Mr. Gasperini's inability to recreate those conditions, as a studio photographer could do with a model shoot; (iv) the uniqueness of his photographs, given the remote places he traveled to, and the dangerous conditions under which they were obtained; (v) reflective value from group value of the individual images; (vi) defendant's acknowledgement of the professional quality of Mr. Gasperini's photographs; (vii) defendant's awareness of their value, as evidenced by defen-

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[5] *See*, plaintiff's pre-trial brief at pp 21-23, discussing, *inter alia*, *Girard Studio Group v. Young & Rubicam*, 147 A.D.2d 357, 536 N.Y.S. 709 (1st Dept. 1989) and *Hoffman v. Portogallo*, Supreme Court, N.Y. County, N.Y.L.J. February 16, 1987 (Gabel, J.), where the $1,500 minimum industry standard was enforced. Indeed, *Girard* is significant in that the Appellate Division *reduced* a higher award to the $1,500 industry standard minimum.

dant's admissions made to Mr. Gasperini, and as evidenced by the frantic efforts by defendant's employees to locate the lost slides; (viii) Mr. Gasperini's conduct in protecting and caring for his slides as valuable property; and (ix) the testimony of Jane Kinne, plaintiff's expert, the only witness at trial with experience in valuing photography, who specifically testified that Mr. Gasperini's photographs were worth $1,500 a piece.

THE VERDICT WAS FULLY SUPPORTED BY THE EVIDENCE

13. Defendant argues that: (i) its expert testified Mr. Gasperini's slides "had, at best, minimal market value" (Montbach Aff. at ¶ 6); (ii) Jane Kinne, plaintiff's expert, supposedly testified the industry standard was never followed (Montbach Aff. at ¶ 9); and therefore, (iii) the industry standard "was never factually or legally established." [Montbach Aff. at ¶ 10.]

14. The trial transcript refutes this argument conclusively. Plaintiff's expert testimony clearly established that the verdict was supported by the evidence, as she specifically testified that each slide was worth $1,500. That assessment was based on various factors, as discussed below, and reinforced by the testimony of numerous witnesses, including defendant's president and defendant's expert.

15. As demonstrated in the accompanying memorandum of law, where the jury's verdict involves assessment of the relative credibility of the experts, the verdict cannot be disturbed by a post-trial motion.

A. WILLIAM GOODMAN

16. William Goodman is defendant's President. He is a graduate of Princeton University and Columbia University Business School. The defendant is a business belonging to his family. His father is the Chairman.

17. In response to a direct questions from plaintiff's counsel herein, Mr. Goodman admitted that: (i) in producing his business records for trial, language demonstrating defendant's knowledge of the minimum industry standard was excised; and (ii) defendant was in fact aware of the minimum industry standard.

Q. And you were to search your records and to deliver to me the delivery memos, is that correct?
A. Correct.

* * *

Q. Mr. Goodman, isn't it true that on numerous of these exhibits that you have copied for me only the front and not the printed language on the back of the delivery memos?
A. Yes.

* * *

Q. And printed on the back of that document, the language you neglected to produce to me from your records, is the minimum industry standard of $1,500 per slide, isn't that correct?

* * *

A. the number $1,500 is on this document.

* * *

Q. Also in Plaintiff's Exhibit 30, the documents you produced this morning, is a delivery memo from Photo Researchers, Inc., Mr. Zentmaier's company, is that correct?
A. Yes.
Q. And that's to your company, isn't that correct?
A. Yes.
Q. It's your business record?
A. Yes.
Q. You also neglected to copy the back of that document and give it to me, isn't that correct?

A. Yes.

Q. You were here in court this morning and on Monday when Mr. Abady . . . examined Mr. Zentmaier and presented him the various documents in Exhibit 12 which were admitted in evidence from Photo Researchers?

A. Yes.

Q. And you heard him testify that the language on the back of his form was the same $1,500 industry standard, correct?

A. Yes.

Q. You heard that testimony?

A. Yes.

Q. Is there a reason why you didn't make me a copy of that from your records?

A. No, no reason.

* * *

Q. Isn't it true that you're aware of the industry standard, your company, Guidance Associates, the Center for Humanities?

A. Yes.

[Tr. at 173-78].[6]

18. Contrary to the assertion of defense counsel, Plaintiff proved both the existence of the minimum industry standard and defendant's awareness of it from the mouth of defendant's principal.

19. Further, Mr. Goodman acknowledged the quality of Mr. Gasperini's photographs.

Q. Mr. Goodman, Bill Gasperini's slides that were part of the three-part video series that you produced, which is Plaintiff's Exhibit 10, contained a number of shots taken from scenes of civil war in Central America, isn't that correct?

A. Yes.

---

[6] *See* also, Tr. at 180-84, where the same admissions are repeated.

Q. And that was your prime motivation for selecting Mr. Gasperini's photos, was it not, sir? For use in the program?

A. Yes, sir.

A. Yes, that's correct.

Q. And you were quite pleased with the professional quality of Mr. Gasperini's work, were you not?

A. Yes, I was.

[Tr. at 187-88.]

20. Mr. Goodman also admitted to Mr. Gasperini the photographs were valuable, and further admitted he had everyone in his company search for them because of their value.

Q. I'll rephrase the question. During that telephone call from Moscow, Mr. Gasperini was very upset, was he not?

A. Yes.

Q. Upon learning that his slides were lost.

A. Yes.

Q. And during that conversation he told you they were valuable, didn't he.

A. Yes.

Q. And you told him you knew they were valuable?

A. Yes.

Q. And you told him because of that, that's why you conducted such an extensive search, isn't that correct?

A. Yes.

Q. And that not only did you instruct your staff to do so, but you yourself searched for the slides?

A. Yes, I did.

Q. And that you enlisted the support of almost everyone in your agency.

A. Yes.

Q. In your firm.

A. That's correct.

Q. About 40 people at the time.

A. Right.

B. ROBERT ZENTMAIER

21. During pre-trial discovery, defendant failed to produce copies of delivery memos in its files, despite repeated demand by counsel herein. On June 24, 1994, counsel herein wrote to Mr. Montbach demanding that documents previously requested be produced in court on June 27, 1994, the first day of trial. The documents were not produced.

22. In anticipation of defendant's default, counsel herein located Robert Zentmaier, and subpoenaed him to trial. Mr. Zentmaier is the President of Photo Researchers, Inc., one of the largest photo stock agencies in the country, which maintains about one million slides in inventory. [Tr. at 158.] He testified that defendant dealt repeatedly with his company in the past, going back to the late 1970's.[7]

23. Mr. Zentmaier established both the existence of the minimum industry standard,[8] and defendant's knowledge of it.

> Q. Mr. Zentmaier, to your knowledge have employees of the Center for Humanities been on your premises to pick up slide transparencies.
>
> A. Yes, they have.
>
> Q. And when they pick up slide transparencies on your premises, are they required to sign something?
>
> A. Yes, they are.
>
> Q. And what are they required to sign?
>
> A. A copy of the delivery memo.
>
> * * *

[7] Defense counsel distorts the record by referring to Mr. Zentmaier as an expert witness for plaintiff. [Montbach Aff. at ¶¶ 4 and 9.] Mr. Zentmaier was a fact witness, not an expert witness. He testified that he has never seen Mr. Gasperini's photographs. He was not asked, and did not testify, about his knowledge or experience in valuing photography. He gave only factual testimony about his company's dealings with the defendant, and the practices in his industry. Defense counsel asked him: "Sir, are you being compensated for being here today?" His answer was: "No, I'm not." [Tr. at 164.]

[8] This testimony occurred on the first day of trial; the transcript is not yet available, and hence, no page citation is given.

> Q. The question is: What is the purpose of having someone sign the delivery memo on your premises prior to taking slide transparencies off the premises?
>
> A. Well, it's to prove receipt and bind them to the terms of delivery.
>
> Q. And one of the terms of delivery is the industry standard of $1,500, is that correct?
>
> * * *
>
> A. Yes, it is.
>
> * * *
>
> Q. I place before you plaintiff's Exhibit 12G. Can you tell the jury what that is, Mr. Zentmaier?
>
> A. It's a copy of a delivery memo for photos submitted to Guidance Associates in October of 1993.
>
> Q. And did someone sign for that delivery memo from Guidance Associates?
>
> A. Yes, there's apparently an employee of Guidance Associates on the premises who did the selection of these images and she signed for them and she received them.
>
> Q. And could you tell the jury her name?
>
> A. Gretchen Jones.
>
> * * *
>
> Q. I'd like to show you now what's been marked as 12E . . . in evidence . . . and ask you to take a look at that and tell the jury what that document is?
>
> A. This is a copy of an invoice that was sent to Guidance Associates in May of 1993 for the use of a photograph on the cover of a catalogue.
>
> * * *
>
> Q. And on the invoice like the delivery memo is the industry standard also printed?
>
> A. Yes, it is.

[Tr. at 154-55; 165-66.]

24. Again, contrary to the assertion of defense counsel, plaintiff proved both the existence of the minimum industry standard and defendant's awareness of it from an independent fact witness whose company did business with defendant over several decades.

C. Charlotte Gasperini

25. Prior to the transaction between Mr. Gasperini and defendant, Mr. Gasperini kept his slides with his mother, Charlotte Gasperini.

26. Mrs. Gasperini's testimony demonstrated that she treated the slides as valuable property and kept them secure. Specifically, she testified that: (i) she lives in a carriage house on an estate surrounded by a fence several miles long, located in Chappaqua, New York; (ii) her house, and the others on the estate, are protected by an elaborate security system located in her dwelling; (iii) the slides were mounted in sheets inside binders, or in sealed plastic boxes supplied by the developer; (iv) these binders and boxes were kept in a storeroom accessible through an electronic door; and (v) she has never been burglarized.

> Q. What has been your attitude about maintaining Bill's slides?
>
> A. I've always felt that I was the guard to take care of them.

27. This testimony demonstrated the care Mr. Gasperini took in safeguarding his valuable property.

[Tr. at 200-03.]

D. William Gasperini

28. From Mr. Gasperini, the jury heard extensive testimony and received exhibits, any or all of which clearly supported its verdict in this case.[9]

[9] Because Mr. Gasperini's testimony was extensive, it is not recapitulated here at length. Instead, the topics he discussed are summarized herein.

29. Specifically, the jury heard Mr. Gasperini's testimony about:

(i) his educational and language credentials;

(ii) his experience as a foreign correspondent;

(iii) the importance of his background and training to his work as a professional photographer;

(iv) his experience as a photographer and photojournalist for more than a decade;

(v) the world class publications for which he has both written news stories and published photographs, including front page photographs;

(vi) the unique circumstances under which his photographs were taken, including travel to remote jungle and mountainous regions, and the dangers he was exposed to, including the risk of death, in obtaining many of his photographs;[10]

(vii) the unusual subject matter of his photographs;

(viii) the impossibility of recreating the conditions under which his lost photographs were taken;

(ix) the type of professional equipment he uses;

(x) the varying uses for his work, including newspapers, magazines, slides shows presented to educational institutions, computer programs, and advertising;

(xi) the extensive editing process he undertook to cull his 300 select photographs from the outtakes, which took several hundred hours over the course of a year;

[10] "The most graphic images I have were taken in 1989 when the leftist rebels launched an offensive to try to overthrow the government. It was an extremely dangerous situation, combat throughout the city. The day after I arrived, I went out with a couple of print reporters to an area and we were stopped at an army roadblock. A few moments later some shots rang out. One of my colleagues was shot and killed. Meanwhile, there were a lot of civilians trying to leave the battle zone, further up on the hillside, and they were waiving white flags. I also took a picture of a dead body in the gutter. Some of these were included in the 310 [lost photographs]." Tr. at 253.

(xii) his selective eye, and the method he uses in obtaining photographs;

(xiii) the role of his language abilities in capturing foreign subjects, either by persuading them to pose, or in obtaining their assent to his photographing them, or identifying other subjects to photograph;

(xiv) his career plans to synthesize and market his work, which included publication of a definitive pictorial of Central America in a time of civil war and turmoil, and thereafter, placement of his work in stock agencies for multiple and recurring uses;

(xv) the quality of his work, as demonstrated by his pictures from Asia, Africa, the Middle East, and the former Soviet Union;

(xvi) the quality of his work, as demonstrated by his pictures in defendant's video series, Conflict in Central America; and

(xvii) that the best work of his career were the 300 slides defendant lost.

[Tr. at 210-310, *passim*.]

30. Mr. Gasperini's testimony was both cogent and compelling. It is clear the jury was impressed with the breadth of his experience, the depth of his knowledge regarding the subject matters he photographed, and the quality of his work as a photographer. As demonstrated below, this testimony was amplified and reinforced by the opinion testimony of William Kuebler and Jane Kinne.

E. WIILIAM KUEBLER

31. Mr. Kuebler testified both as a fact witness and an expert witness. The jury heard his credentials, i.e. that: (i) he was an accomplished and award winning photographer; (ii) his photographs have been published in national media, such as USA Today, Sports Illustrated, Next Magazine, Women's Daily, and several books; and (iii) he is a photo editor with

the Gannett organization, one of the nation's largest newspaper chains, and has sixteen award winning photographers working under him.

32. Mr. Kuebler also testified that original slide transparencies are "kept under lock and key . . . [b]ecause they cost a lot of money to replace." [Tr. at 313]

Q. How much money do they cost to replace?

* * *

A. $1,500 was the last one I worked with.

Q. Is that the industry standard for a lost or damaged slide?

* * *

A. It's the industry minimum.

Q. Industry minimum. how long have you been aware of that industry minimum?

A. Probably about 15 years when I first started.

[Tr. at 313.]

33. Mr. Kuebler further testified that information about the minimum industry standard was readily and widely available to photographers and members of the industry. Specifically, he identified *The Photographers Marketplace*, *The Photographers Handbook*, and *The Photographers Buyers Guide* as the common and well-known sources in which the industry standard is published.

[Tr. at 313-14.]

34. Mr. Kuebler further testified to his familiarity with Mr. Gasperini's work, and compared it with the hundreds of other professional photographers whose work he has edited over his career.

Q. And of the photographs that you've seen taken by Bill Gasperini, how do those particular photographs, Exhibit 18, compare to the awardwinning photographs of other photographers or others in the Gannett organization?

A. These are all wonderful photographs. Their composition is excellent, their lighting is very good, subject matter is gripping. They are every bit as good, if not better, than the photographs that we've taken.

Q. How does Bill Gasperini's work as a photojournalist compare generally to the photojournalists whose work you edit on a daily basis?

A. Bill is an excellent photographer. His technical skills are great. His composition as I said before is wonderful. But more so I think it's his access to areas which is very important. He gets places where no one else goes, where our staff couldn't get.

[Tr. at 315-16.]

35. Mr. Kuebler was not paid for his appearance in court. [Tr. at 318.] From his testimony, the jury could determine that Mr. Gasperini's photographs were of exceptional quality and uniqueness, which itself fully supported the verdict.

F. JANE RINNE

36. Plaintiff's expert had impressive credentials concerning photography generally, and in the valuation of original photography specifically. Notably, defendant's expert did not begin to match Ms. Kinne's credentials in this regard. *See* ¶¶ 52-59, *infra*.

37. Ms. Kinne worked 47 years in the photo industry. Her credentials included: (i) running the photo agency of the National Audubon Society; (ii) 30 years at Photo Researchers, Inc., one of the largest stock agency in New York, including 12 years as its president; (iii) serving as Director of the editorial department at Comstock, another large photo stock agency; (iv) lifetime membership in the Picture Agency Council of America ("PACA"), the trade organization of photo stock agencies; (v) service as President of PACA, Chairman of the Legal Committee, and Chairman of the Executive Committee for six years; (v) service as National President and Chairman of the Legal Committee of the American Society of Picture Professionals; (vi) a sustaining member of

the American Society of Media Photographers, and a member of the Committee on Valuation; (vii) a speaker and panelist at every Photo Expo since its inception in 1983; (viii) panelist at the International Photographic Congress; and (ix) appraiser of photographs for tax purposes for universities, museums and galleries.

38. Ms. Rinne examined Mr. Gasperini's outtakes, his select pictures from Asia, Africa, the Middle East and the former Soviet Union, and interviewed him extensively regarding his techniques and editing.

39. Based on her experience, her evaluation of Mr. Gasperini and his work, she offered her professional opinion:

Q. What is your opinion of the quality of Mr. Gasperini's work?

A. I think he is a first class professional photojournalist.

[Tr. at 327.]

40. Ms. Kinne testified extensively about: (i) the variables used by photographers to take professional quality photographs; (ii) the technical process involved in taking photographs; (iii) the importance of a photographer's knowledge of the region and language skills; and (iv) the relationship of one photograph to a body of work, such as Mr. Gasperini's photographs of Central America.

41. Ms. Kinne also testified about the minimum industry standard.

Q. Ms. Kinne, could you tell the ladies and gentlemen of the jury is there an industry standard for a damaged or lost color slide transparency?

A. Yes, there is. . . . It's $1,500 per professional-taken and professionally-edited transparency.

Q. Are Mr. Gasperini's works as you have seen professionally taken?

A. Yes, they are.

Q. Are they professionally edited?

A. Yes, they are.

[Tr. at 332.]

42. Ms. Kinne also explained how the minimum industry standard was arrived at, and described in detail the survey conducted over several years by the American Society of Magazine Photographers in 1969 which included all sides of the photographic industry, including photographers, agents and users, such as advertising agencies, promotion firms, publishers of trade books, textbooks, encyclopedias, and producers of educational material, including the defendant.

43. She testified that "the average reuse figure and the figure for the outright sale of all rights was a $1,500 figure. That figure was then used starting in the early 70's and was actually printed in the 1973 Guide to Business Practices by ASMP." [Tr. at 334.]

44. Ms. Kinne testified that the minimum industry standard is published in industry guidebooks widely available to users such as the defendant, including *The Stock Photo Handbook* and the *Legal Handbook of the Picture Agency Council of America*.

45. Ms. Kinne further testified that there are 101 members of PACA, and that each and every one of them uses a delivery memo containing a minimum industry standard.

Q. And is the $1,500 minimum industry standard printed on each and every agency's delivery memo form?

* * *

The vast majority of the members in the Picture Agency Council use the $1,500 figure. A few are now using a $2,000 or $2,500 figure.

Q. That's the value of one color transparency?

A. One original color transparency.

[Tr. at 339.]

46. Ms. Kinne also testified about the criteria used to determine the value of original slides. These were: (i) the

"technical excellence of the photograph;" (ii) "the aesthetic value or the particular eye of the photographer;" (iii) "the value of the subject matter;" (iv) "the way the subject matter has been treated;" and (v) "the value of a particular photograph in relation to a whole, particularly a photojournalist where he's trying to tell an entire story." [Tr. at 343.]

47. She then described her interviews with Mr. Gasperini about his habits as an editor, and had him edit a cross-section of his material in her presence. She also viewed the defendant's video series, "Conflict in Central America."

48. Based on these criteria—independent of the industry standard—she valued Mr. Gasperini's photographs at $1,500 a piece.

Q. And based on all the work that you've just described, can you ascribe a value to the lost 310 slides?

A. Yes. And I valued them at $1,500 each.

[Tr. at 344.]

49. Ms. Kinne went on to explain how she arrived at that figure, discussing the variety of purposes for which Mr. Gasperini's photographs could have been used; the long period of time in which they would have generated revenue; the relationship of copyright to valuation; the range of fees that a single photograph could generate, giving a vivid example of how a photograph she managed, that of an eagle in a certain position, generated $20,000 since 1986 from the Postal Service; explaining the recurrent use of historical photographs, describing how photos from D-Day that sat is stock for 50 years recently generated revenue from the 50th Anniversary celebration reported in newspapers, magazines, and television; and to the multiple and varied uses available for Mr. Gasperini's photographs. [Tr. at 344-50-]

50. Finally, Ms. Kinne confirmed that the minimum industry standard is real and observed by members of the industry.

Q. Now, is the minimum industry standard of $1,500 largely observed by the industry or honored only in the breach?

* * *

A. [I]n the vast majority of cases they pay the $1,500.
Q. By "they" you refer to users such as the defendant?

* * *

Q. Is that correct?
A. Yes.

[Tr. at 351-52.]

51. On cross-examination, Ms. Kinne testified that there is demand today for photographs of Central America, such as Mr. Gasperini's lost slides, and that such demand has existed over the past ten years, and will likely arise again in the future. [Tr. at 360.]

G. DEFENDANT'S EXPERT AND SOLE WITNESS, GIDEON DE MARGITAY

52. One need only review the testimony of this witness and recall his demeanor on the witness stand to understand why the jury rejected his testimony.[11]

53. Mr. de Margitay's had no meaningful credentials in valuing photographs. He was not a member of any of the professional organizations, such as those Ms. Kinne led. He never served on any committee of any professional photographic organization dealing with valuation of photography, nor was he familiar with the methodology by which the minimum industry standard was developed. [Tr. at 392-94; 402.]

54. By his own testimony, his experience consisted essentially of being a purchaser of photographic material for reproduction. "I'm only a humble buyer of photography, sir." [Tr. at 404.]

[11] Indeed, while being cross-examined, defendant's counsel repeatedly raised his hand to restrain his own witness, signaling him to wait until counsel herein had finished asking questions.

55. In addition to the clear deficiency in training and experience, Mr. de Margitay was reluctant to give testimony on the critical issue in the case, i.e. the value of Mr. Gasperini's photographs.

Q. Do you have an opinion of the value of Mr. Gasperini's photos?
A. Again, if you forgive me I will not use the word value.

THE COURT: [If] [y]ou're not going to use the word value, I'm going to tell you not to answer.

* * *

Q. And in your review of Mr. Gasperini's work, have you been able to place a price on what you would pay for the missing slides?
A. Excuse me, I'm somewhat at a loss.

THE COURT: There's been no objection to the question so your answer is yes I can or no I can't.

Q. Yes or no?

A. I can't. It's too broad. I don't know what you mean.

[Tr. at 385; 391.]

56. Defendant's counsel asked Mr. de Margitay about the $1,500 minimum industry standard. In one breath, he denied the existence of the industry standard. In the next, however, Mr. de Margitay admitted: "And this $1,500 . . . became *tradition* in the picture business." (emphasis added) [Tr. at 380.]

57. Under cross-examination, de Margitay admitted he was aware of PACA, aware that its members all used delivery memos, but unaware of the industry standard printed on those documents. He confirmed that Magnum was the premier photo agency in the world, and then was forced to admit that the delivery memo used by Magnum clearly sets forth the $1,500 minimum industry standard. [Tr. at 396-97.]

58. Under further cross-examination, de Margitay admitted that the value of a photograph derived from the photographer's eye and his knowledge of the region and indigenous peoples being photographed. [Tr. at 406.] He further admitted that historical photographs such as Mr. Gasperini's have recurring value, and can be used in different contexts. [Tr. at 407.]

59. In sum, defendant's sole witness was unpersuasive in attempting to deny the existence of the industry standard, and was forced on cross-examination to admit facts which supported the jury's verdict.

THE VERDICT WAS NOT THE RESULT OF PASSION AND PREJUDICE

A. There is no evidence to support defendant's claim.

60. Defense counsel makes the bald claim that the verdict can be explained only by passion and prejudice. However, no evidence is submitted in support of this naked proposition. Indeed, the trial record is replete with evidence to refute it, as outlined above.

61. Rule 403 of the Federal Rules of evidence permits the exclusion of relevant evidence where its inflammatory nature is such that the probative value of the evidence is outweighed by the prejudice it would cause. As demonstrated in plaintiff's brief submitted herewith, Rule 403 favors the admission of evidence, and should be invoked sparingly.

62. Moreover, this is not the typical case where the grisly photograph of a severed limb or mutilated body will inflame the jury, and thereby prevent it from conducting a searching examination in its deliberations of the issues. No such inflamatory evidence was part of this case. Rather, the jury heard straightforward, non-emotive testimony in the context of an action for commercial bailment.

B. The Court gave repeated cautionary instructions.

63. Defendant's argument also conspicuously ignores the Court's repeated cautionary instructions to the jury given throughout the trial that there was no delivery memo from Mr. Gasperini to defendant. Such instructions avoided any possible prejudice or confusion.

> THE COURT: . . . It's understood that there's no delivery memo in this case.

[Tr. at 155.]

> THE COURT: The jury should understand that there is no evidence at the present that either of the parties to this litigation are members [of PACA] or bound by it. Also there's no delivery memo in this case.

[Tr. at 338-39.]

> THE COURT: I'll take the evidence subject to the cautionary instruction to the jurors that these particular parties in this particular case did not have such a memo. But they may consider the existence of this arrangement for whatever information it may supply to help them evaluate the missing slides.

[Tr. at 339.]

> THE COURT: I'll take them [delivery memos] with the understanding that they don't involve this defendant or this plaintiff.

[Tr. at 341.]

64. Likewise, in the charging conference the Court again made reference to the cautionary instruction given throughout the trial.

> THE COURT: The court has already given a cautionary instruction on the so-called industry standard. I will tell them that it's not applicable in this case because there is no delivery ticket incorporating such a provision. They can consider what other do as they find from the testi-

> mony for whatever evidence or whatever assistance it gives them in reaching their conclusion.

[Tr. at 414-15.][12]

THE COURT DID NOT IMPROPERLY LIMIT CROSS-EXAMINATION

65. Defense counsel blatently misrepresents the trial record by claiming: "There was no evidence submitted by plaintiff that any of the lost photographs were unique." [Montbach Aff. at ¶ 6.]

66. The testimony of William Kuebler, Jane Kinne, and Mr. Gasperini himself made plain that the lost photographs were in fact very unique.

67. Defense counsel further distorts the record in claiming:

> In fact, the Court, in precluding deponent from questioning plaintiff on the topic of the existence of other photographers at the times the lost photos were taken, stated that it was common knowledge that there were many other photographers present in Central America at the time plaintiff was taking his photographs.

[Montbach Aff. at 6.]

68. Defense counsel was in fact permitted to elicit testimony on precisely the point he claims to have been precluded on. [Tr. at 299-302.] Further, he had complete freedom to cross-examine Mr. Kuebler on this point, but chose not to. [Tr. at 316-17.] He did in fact cross-examine Ms. Kinne on this point. [Tr. at 360-62.]

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[12] Notably, the Court's limiting instructions conformed precisely to the long standing rule in New York. Under general customs and usages, Richardson states at §187:

> Such evidence is received for what it is worth in view of all of the circumstances of the particular case, and, under proper instruction from the court as to its inconclusive nature, the jury has a right to give it such consideration as they think it should receive in connection with all the other facts. Shannahan v. Empire Engineering Corp., 204 N.Y. 543, 550, 98 N.E. 9, 11, 44 L.R.A. (NS) 1185; Welch v. Enright, supra.

69. In sum, there no is simply substance to this argument whatsoever.

THE MOTION IN LIMINE WAS PROPERLY DENIED; LIKEWISE, THE COURT'S JURY INSTRUCTIONS WERE CORRECT

70. Motions In Limine are widely used in criminal practice, but rarely in civil cases. Defendant's motion sought to prevent plaintiff's experts from testifying about the minimum industry standard. The purported legal basis was defendant's contention that the industry standard did not exist as a matter of law. At the outset of trial, the Court properly ruled that this was an issue of fact. The Court repeatedly advised defense counsel of that basic principle, during and even at the end of trial. [Tr. at 162; 419.]

71. As discussed above, the Court gave repeated cautionary instructions to the jury regarding the industry standard. As the Court noted in the charging conference, the jury learned from the evidence the history of the industry standard, and that all stock agencies use it, as every photograph has a value. The jury considered that only as one factor among the many other factors testified to by plaintiff's witnesses—and even admitted by defendant's expert—in arriving at its determination of the value of Mr. Gasperini's photographs.

72. In short, there is simply no legal merit to this argument.

CONCLUSION

73. The law is clear: neither defense counsel nor even the Court can substitute its finding of facts for that of the jury. In this case, defendant was afforded a full and fair opportunity to present all evidence in its favor, and to contest plaintiff's proof on each and every point.

74. The case was fairly tried, and the jury reached its verdict based on the evidence it received. As the record makes clear, the evidence fully supported the verdict.

75. Accordingly, defendant's Rule 59 motion should be denied in all respects.

76. We swear under the penalties of perjury of the laws of the United States that the foregoing is true and correct.

Dated: New York, New York
July 25, 1994

By: SAMUEL A. ABADY
Samuel A. Abady

By: JONATHAN S. ABADY
Jonathan S. Abady

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 CIV. 7204 (CLB)

WILLIAM GASPERINI,

Plaintiff,

—against—

THE CENTER FOR HUMANITIES, INC.,
d/b/a GUIDANCE ASSOCIATES,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that defendant, The Center For Humanities, Inc., d/b/a Guidance Associates, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment in favor of the plaintiff, William Gasperini, in the sum of $564,750.00 as against the defendant, The Center for Humanities, Inc. d/b/a Guidance Associates, entered in this action on the 30th day of June, 1994, as well as the Order of the Court entered on the 29th day of July, 1994, denying defendant's motion pursuant to FRCP Rule 59.

Dated: New York, New York
August 11, 1994

BIGHAM ENGLAR JONES & HOUSTON
ATTORNEYS FOR DEFENDANT
THE CENTER FOR HUMANITIES, INC. D/B/A
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